Justice of the Peace

VOLUME CXLIX 1985

INDEX

(ARTICLE REFERENCES ARE GIVEN IN ITALIC TYPE)

(An Index to Cases Referred to is given at p.843, *post*)

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CASES REFERRED TO

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INDEX TO JUSTICE OF THE PEACE REPORTS 1985

NAMES OF CASES

SUBJECT MATTER COVERED IN THIS INDEX

ANALYTICAL INDEX TO CASES

ADOPTION

Adoption — power under s. 8(7) of the Children Act 1975 to make an adoption order with a condition as to access — exercise of that power where a natural parent opposes the making of the adoption order.

A mother whose child had been in the care of the local authority and in the applicants' foster care for three and a half years maintained contact with the child and regular access continued. When the foster parents applied for adoption the applicants and the local authority agreed that access between the child and the mother should continue, but the mother withheld her consent to the adoption. The Judge was invited to make an adoption order and include a condition for access to the mother.

The Judge considered that access should continue and that adoption was not in the child's best interest because of the confusion that would be created by the resulting relationship and because of the possibility of confusion as to the enforcement of access. He considered that the mother was not unreasonably withholding consent and he refused to make an adoption order. The applicants appealed.

Held: There is no rule that all contact should cease between child and natural parent when an adoption order is made, but it remains highly undesirable that such contact should continue. An order with a condition for access should be made only in the most exceptional circumstances. Where it remains desirable that contact between child and parent should be maintained it is right that an adoption order should be refused. *In re G. (T.J.).* (1963) 127 J.P. 144; [1963] 1 All E.R. 20, C.A., followed.

Appeal from the refusal by the county court Judge to make an adoption order.

Re M (a minor) C.A. 574

AFFILIATION

Affiliation — complaint for order made more than three years after birth — payment of money for child's maintenance — gift of clothing.

During the three years after the birth of an illegitimate child the mother and father did not cohabit and the father paid no money to the mother by way of maintenance, but in that period he made a gift of clothing to the child. The magistrates considered that the making of the gift did not establish how he had acquired the clothing so there was no evidence that he had paid money for it. They dismissed the application for an affiliation order and the mother appealed.

Held: On proof of the father having made the gift, the proper inference was that he had paid for the clothing himself. That payment was for something which could properly be regarded as maintenance and thus satisfied the condition which enables the making of an order on proof of payment of money for the child's maintenance. Appeal allowed.

Appeal by case stated against dismissal of application for an affiliation order.

Willett v. Wells Fam. Div. 454

Affiliation — no presumption of law that a male under 14 years of age cannot father a child

The mother of an illegitimate child applied to a magistrates' court for an affiliation order against a male person who, at the time of the conception of the child, was 13¾ years old. The magistrates were satisfied by the evidence that he was the father of the child.

It was submitted that there was an irrebuttable presumption of law that he was incapable of being the father. The magistrates rejected that submission and made an affiliation order. The father appealed.

Held: In affiliation proceedings there is no irrebuttable presumption of law corresponding to the irrebuttable presumption in criminal law that a male under 14 is not able to have sexual intercourse.

Appeal dismissed.

Appeal by case stated to the High Court (Family Division) against the making of an affiliation order by a magistrates' court.

Kane v. Littlefair Q.B.D. 312

Affiliation order — enforcement of arrears — evidence to justify committal for default — limiting enforcement to one year's arrears with remission of remainder.

The defendant failed for many years to make any payments under an affiliation order. Upon enforcement proceedings he applied for arrears to be remitted, supporting that application by his evidence that he had been successively under the influence of an extremist religious sect, travelling in Spain, and, upon returning to England, living upon student grants. The magistrates remitted some arrears, leaving arrears equivalent to 188 (or 143) weeks' payments, and committed him to prison for culpable neglect to pay, suspended on payment of weekly sums. Because of a clerical error the register of the magistrates' court did not record the committal to prison.

The defendant appealed by case stated against the magistrates' refusal to remit a greater amount of arrears and against the order of committal to prison on the ground of insufficient evidence to justify it. The mother applied for judicial review to rectify the magistrates' court register by recording the committal to prison.

Held: (1) In the absence of evidence that there was an unusual reason for default in payment, there was no justification for the magistrates' failure to follow the practice (or principle) that no more than one year's arrears should be enforced and the remainder remitted.

Pilcher v. Pilcher (No. 2) **(1956) 120 J.P. 127; [1956] 1 All E.R. 463.**
Ross v. Pearson **(1976) 140 J.P. 282.**
Fowler v. Fowler **(1981) 2 F.L.R. 141**
referred to.

(2) For the same reason a finding of culpable neglect upon which to base a committal to prison could not be justified.

(3) The magistrates' court should rectify its register to record the committal to prison.

Defendant's appeal allowed and judicial review granted.

Appeal: to the Family Division of the High Court from proceedings in a magistrates' court to enforce arrears under affiliation order, and application to the Queen's Bench Division for judicial review.

Dickens v. Pattison; R. v. Camberwell Green Justices, ex parte Pattison and Dickens
Fam. Div. and Q.B.D. 271

CHILDREN AND YOUNG PERSONS

Access to a child in care granted to mother by juvenile court — order quashed on appeal — mother appeals to Court of Appeal — observations on principles to be adopted by magistrates in relation to recommendations of a guardian ad litem.

Devon County Council had in their care a child, Wendy. They served notice upon the mother under s. 12 Child Care Act 1980 terminating access. The mother applied to Exeter city juvenile court for an access order. The guardian ad litem recommended that any access granted should not be for an indefinite period but should be of limited duration. The juvenile court disagreed and made an order that access should be allowed once every month. The county council appealed to the Family Division and were successful, the juvenile court's order being set aside. The Judge of the Family Division intended that the plan for the child presented by the county council and guardian ad litem should be pursued, but made no order to that effect. The mother's right to apply for a variation of access in the event of changed circumstances was thus removed.

Appeal: By the mother against the decision of the Family Division.

Devon County Council v. Clancy C.A. 521

Appeals from care proceedings — do parents have right to appeal on behalf of child where separate representation has been ordered.

The appellants were parents of a child born on April 15, 1984. In June 1984 Avon County Council made an application to Avon North juvenile court in respect of this child under s. 1(2)(a) of the Children and Young Persons Act 1969. Prior to the hearing itself an order under s. 32A(1) of the 1969 Act was made by the court, ordering separate representation for the child in the proceedings, and by s. 32A(3) that order was extended to cover representation for any appeal to the Crown Court which might arise as a result of the proceedings. Consequently under r. 14(1) of the Magistrates' Courts (Children and Young Persons) Rules 1970, the court appointed a guardian ad litem for the child for the purpose of the proceedings.

Eventually the hearing of the application was concluded (on August 2, 1984), when a Care Order was made on the ground that the child was ill-treated and in need of care and control which he was unlikely to receive unless the order was made. On August 9, 1984 the parents gave notice of appeal to the Crown Court, but the Judge before whom their case came ruled that they had no right to bring that appeal.

The submissions put to that Judge were therefore repeated in the Family Division as follows: first, although it was conceded that by virtue of s. 2(12) of the 1969 Act and the case of *B and Another v. Gloucestershire County Council* (1981) 145 J.P. 141; [1980] 2 All E.R. 746, that the parents could only bring an appeal if acting on behalf of the infant, the order which had been made ordering separate representation for the child under s. 32A of the 1969 Act had been made erroneously, since this was not a case where it could have appeared to the court that there was or might be conflict between the child's interests and those of his parents. Secondly, that the order under s. 32A was only effective when the question of costs and eligibility of the guardian ad litem for legal aid was being considered, and thirdly by virtue of the *Gloucestershire County Council* case the parents still had the right to appeal on behalf of the infant as well, regardless of the fact that the guardian ad litem's right to represent the infant was extended for the purpose of any appeal to the Crown Court by the order under s. 32A(3).

Held: 1. It was untenable to suggest that there was no conflict in this case. The interests of parents defending themselves against an allegation of ill-treatment of their child would almost inevitably be in conflict with the interests of the child who would require protection.

2. The exclusion of parents from representation of the child has no bEaring whatever on the

incidence of costs for the guardian ad litem, and the appointment of a guardian ad litem cannot in any way be affected by the fact that he may or may not be granted legal aid. In any event s. 32B(2) of the 1969 Act showed that an order under r. 14(1) is consequent upon and not antecedent to an order under s. 32A(1).

3. The right of the parents to appeal in the *Gloucestershire County Council* case arose only because they were the only persons present who were in a position to represent the child in exercising his right to appeal under s. 2(12) of the Act. However, once a guardian ad litem has been appointed it is *only* through him that a child can exercise this right. It would be quite wrong for someone else also to be entitled to appeal on his behalf, particularly where there could be a situation where the two appellants were in conflict. Moreover a parent could not exercise the right to appeal on behalf of the child once the guardian ad litem had effectively become functus officio by declining to exercise this right once he had given consideration to the question of an appeal.

Accordingly the appeal would be dismissed.

Appeal: by the parents of the child by way of case stated from a decision of Judge Sir Ian Lewis sitting in the Crown Court on October 18, 1984 whereby he held that the parents had no right of appeal against an adjudication made by Avon North Juvenile Court on August 2, 1984 under s. 1 of the Children and Young Persons Act 1969.

Ashley-Rogers v. Avon County Council Fam. Div. 401

Child — access — over-possessive mother having custody and indoctrinating children against father and denying access — interests and welfare of children.

During two years of separation the mother actively encouraged the two children of the marriage, aged five and a half and four years, to be frightened of their father. She refused to allow access to him and refused to allow contact between him and the children at a grandparent's house. A psychiatrist advised that it was impossible to restore a normal relationship between parent and children at that time, that an attempt to enforce access would not be in the children's interests and that it would be emotionally damaging. The Judge refused the father's application for access, and the father appealed.

Held: In view of the medical evidence the Judge's order could not be faulted. If, as a result of continuing efforts by the psychiatrist, the implanted fears could be removed, the father could re-apply. The welfare of the children required that they should have access to both parents, and continued resistance by the mother might give ground for questioning her suitability for continuing custody. In the children's present interest the application could not be allowed. Appeal dismissed.

Appeal from the refusal by county court Judge to order access between children and their father.

Williams v. Williams C.A. 540

Child — custody and access order made in magistrates' court — proceedings for disobedience — filing of petition in county court for judicial separation and review of access — informal application to magistrates' court for adjournment of enforcement proceedings.

An order made in a magistrates' court under s. 8 of the Domestic Proceedings and Magistrates' Courts Act 1978 put two children of the family into the mother's custody and provided for access

by the father. After repeated applications by the father to enforce the order for access and the imposition of a financial penalty for one default, he instituted fresh proceedings for a new default.

Two days before the hearing the mother filed a petition for judicial separation and on the day before the hearing filed an application in the county court for reconsideration of the question of the father's access and for a declaration under s. 42(3) of the Matrimonial Causes Act 1973 that the father was unfit to have custody or access.

The mother's solicitor did not appear in the magistrates' court at the hearing of the default proceedings but wrote a letter which was received while the court was sitting asking for an adjournment. The solicitor also wrote that the magistrates' court had no jurisdiction to proceed with the hearing. The magistrates continued the hearing of the default proceedings and found that the mother's refusal of access was wilful. They then adjourned the proceedings for a decision as to the appropriate sanction to impose.

The mother appealed.

Held: The magistrates' court undoubtedly had jurisdiction to hear the default proceedings. In the circumstances of the case the court should not have exercised that jurisdiction.

By the court: It was not satisfactory for the mother's solicitor to make his application for adjournment in that way without someone appearing in the magistrates' court to explain what was happening, and such discourtesy to the court was not excusable on the ground that legal aid was not available for that purpose.

Order that the magistrates' court decision to continue the hearing of the default proceedings be set aside.

Appeal: to the Family Division from a magistrates' court decision to hear default proceedings.

Thomason v. Thomason Fam. Div. 21

Child care — child in care of local authority — application to juvenile court for access order — adoption application pending in High Court — decision of juvenile court to appoint date for hearing access application — appeal to High Court against that decision — application for judicial review of that decision.

At a time when adoption proceedings were pending in the High Court and it was expected that the mother would withhold her consent, the mother applied to a juvenile court under s.12C of the Child Care Act 1980 for an access order, the local authority having given notice terminating all access between the child and the mother. The juvenile court decided, against objection by the local authority, to proceed with the hearing of that application and appointed a hearing date. The local authority appealed on the principal ground that it was contrary to the child's interest that multifarious welfare enquiries required for the two courts should be pursued simultaneously. As an alternative the local authority also applied for judicial review of the juvenile court decision.

Held: (1) It is appropriate that in such circumstances the first decision should be whether access should be allowed between child and parent, and in this case such a decision could be made only in the mother's s.12C application to the juvenile court. Whether there is justification for allowing parental access when adoption proceedings are pending is a matter to be tested by the evidence on the hearing of the access application. *Re M* (1984) CA followed.

(2) The decision of the juvenile court to proceed with the hearing of the application is a decision which can be challenged both by appeal to the High Court in accordance with s.12C(5) of the Child Care Act 1980 and by application for judicial review.

(3) The juvenile court had heard no evidence, and in the circumstances the appeal was premature.

Appeal dismissed and application for judicial review refused.

Exercise of wardship jurisdiction over children who are subject to care proceedings — High Court not to exercise supervisory role over local authority's performance of administrative duties — re-assertion of principles in A. v. Liverpool City Council (1981) 145 J.P. 318; [1982] A.C. 363.

In this case the child born on November 11, 1980 had been rejected by both her parents from a very early age and eventually they asked the local authority to take her into care. Consequently in August 1984 the local authority obtained a place of safety order under s. 28(1) of the Children and Young Persons Act 1969. On September 4, 1984 the juvenile court granted the local authority an interim care order, which it had applied for with the full backing of both parents. It had been agreed between the local authority and the parents that not only must a care order be obtained, but also that steps should be taken to free the child for adoption by applying to an authorized court for the requisite order under s. 14 of the Children Act 1975. The adjourned hearing of the local authority's application for a care order was due to be heard on October 2, 1984. Throughout the proceedings thus far the parents had managed to prevent the child's wider family (who in no way rejected her) from finding out what plans were afoot for the child. However, on September 25, 1984 the child's uncle, aunt and grandparents issued a summons in the High Court claiming against the local authority that she should be made a ward of court and that her care and control should be given to her uncle and aunt, and that the grandparents should have access to her. On October 3, 1984 the local authority applied by summons for the child to cease to be a ward of court. The Judge at the hearing decided that the High Court should exercise its wardship powers, since, though he recognized the parents' wish to have the child taken into care and also freed for adoption, he was also aware that the four plaintiffs, members of the child's wider family, were vehemently opposed to such orders and wanted to be heard by the court as to whether the local authority would be acting in the child's best interests if they decided to apply for an order freeing her for adoption. The Judge clearly felt that the members of the wider family should be heard, and since no member of the family (including parents) have the right to be heard in the juvenile court during care proceedings, and only the parents have the right to be heard by the court to which application is made to free the child for adoption, the exercise of wardship jurisdiction was the only way that the other members of the child's family could be heard. The effect of this order therefore was that the local authority would be required to exercise its statutory powers as directed by the High Court in exercising its wardship jurisdiction. The local authority appealed principally because it felt that the Judge should have declined jurisdiction in view of the fact that there were already care proceedings pending. This appeal was allowed by a majority in the Court of Appeal, and consequently the four appellants in this case (the members of the child's wider family) appealed to the House of Lords against this decision.

The submissions were twofold: first, that the limits which had been set in the case of *A. v. Liverpool City Council* (1981) 145 J.P. 318; [1982] A.C. 363 upon the High Court's intervention by exercise of wardship jurisdiction notwithstanding the existence of care proceedings were not exhaustive, and there still remained a residual category of exceptional cases (of which this was one) which would require the intervention of the High Court. The second submission was that in any event this case did fall within the limits set by the *Liverpool* case, since it was one which raised "an area of concern to which the powers of the local authority limited as they are by statute did not extend" as per Lord Wilberforce in that case. In this situation the local authority's powers were inadequate to allow full faith to be given to the overriding principle of the law (whether applied judicially or administratively) that in matters of custody, control and upbringing the welfare of the child must be the first and paramount consideration.

Held: By a unanimous decision the appeal would be dismissed. First the submission that the *Liverpool* case did no more than set guidelines to the exercise of wardship jurisdiction by the High Court must be rejected. The High Court could not exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted specifically by Parliament to another public authority which acts administratively. The courts must be careful to avoid

assuming a supervisory role or a reviewing power over the merits of decisions taken administratively by the selected public authority. In this case the whole object of the appellants in instituting wardship proceedings in respect of this child was to ensure that the High Court would be in a position to review the decisions of the local authority taken in respect of her on their merits which it clearly should not do, other than in the context of judicial review.

Secondly, in this particular case, there was no lack of power in the local authority which needed supplementing by the exercise of the High Court's wardship jurisdiction. The local authority in the exercise of its administrative discretion could, if it chose to, consult with members of the child's wider family as easily as the court, if the child were its ward, could in the exercise of its judicial discretion hear them on the question of whether application should be made to free the child for adoption. Where the court perceives that the action sought of it is within the sphere of discretion of the local authority, there is no case for the existence of a wardship order. Whether the case is resolved by the local authoirty or the High Court, the question before the resolver is precisely the same, namely whether a home with adopters who are strangers as envisaged by the local authoirty, or a home with the uncle and aunt as sought by them, with aecess to the grandparents, or some other solution, would be in the best interests of this child. The body which Parliament had chosen to resolve that dilemma was the local authority, and it would be wrong to undermine the statutory scheme by exercising wardship jurisdiction where the local authority's powers in this area were comprehensive.

Appeal: by four appellants — the child's uncle, aunt, and grandparents — against a decision by the Court of Appeal allowing an appeal by Hertfordshire County Council to discharge this child from wardship jurisdiction.

In re W (a minor) H.L. 593

Issue of certificate of unruly character — to what extent is local authority's report on availability of accommodation binding on the court — can court overrule recommendation in such a report.

The applicant (aged 16 years at all material times) first appeared before the Leicester City Juvenile Court on June 30, 1984 on two charges of assault occasioning actual bodily harm and one of robbery. He was then certified unruly under s. 23(2) of the Children and Young Persons Act 1969 until July 4, 1984. On July 5, 1984, after one further remand for a day in the police cells for the court to acquire further information from a social worker, the applicant was remanded to the care of the local authority after the court had considered a report from a social worker indicating the availability of suitable accommodation at the Holt Community Home. He was subsequently remanded into care on three further occasions, but on July 26, 1984 he absconded from the Holt, and failed to appear in court on July 31, 1984, when the court were informed that he had absconded. He was arrested on August 27, 1984 and it was alleged in the meantime that he had committed two further offences of burglary and attempted robbery. On August 28, 1984 the applicant was brought before the Loughborough justices who remanded him in custody, and remitted the case to the Leicester City juvenile court.

On August 30, 1984 the applicant appeared before that court, and when the justices were informed of two further charges pending and a possible nine other offences to be taken into consideration, an application for bail was refused. The justices then had to consider whether a certificate of unruly character should be issued, and a further report from the social worker was submitted. In essence the report stated that the applicant did not satisfy the criteria for admission to secure accommodation and that therefore the applicant should be placed on remand to care back at the unit at the Holt. The justices were plainly not happy and asked further questions of the social worker and established that the Holt did not have secure accommodation. Eventually they decided to issue a certificate of unruly character and remanded the applicant in custody.

The Appeal Court had before it an application for judicial review, and the applicant sought an order of certiorari to quash the certificate of unruly character issued on August 30, 1984, based on the submission that if there was nothing in the report from the local authority which enabled the justices to say that there was no suitable accommodation for the applicant, then there was no basis upon which they could have certified the applicant to be of unruly character.

Held: The application for judicial review would be dismissed. The report to the court from the local authority was not conclusive, and could not pre-empt the final decision of the court.

The issue of certificates of unruly character was governed by s. 23(2) of the Children and Young Persons Act 1969 read in conjunction with s. 69 of the Children Act 1975. These were supplemented by the Certificate of Unruly Character (Conditions) Order 1977 (S.I. 1977 No. 1037), and para. 3 of that order was the relevant provision here. The first two remands in custody had been made by virtue of sub-paras. 3(a)(i) and 3(b)(i) of that order where the court was remanding the applicant for the first time. But when the matter came again before Leicester City Juvenile Court on August 30, 1984, the court purported to act under sub-para. 3(a)(ii) and 3(b)(ii) of that order. Then, of course, the court had a duty to consider the report from the local authority and to take its contents into account: but the question of whether there was suitable accommodation in a community home where the young person could be accommodated without risk was one for consideration by the justices, and the decision is one which must ultimately be left to the court.

Application: by Kevin David Capenhurst for judicial review seeking an order of certiorari to quash a certificate of unruly character issued by the Leicester City juvenile court on August 30, 1984, and an order of the same date by the same court remanding the applicant in custody pending his trial at Leicester Crown Court on charges of robbery and attempted robbery.

CORONERS

Coroners Law — application for certiorari — suicide verdict — onus of proof.

Evidence of a high level of paracetamol in the blood (co-inciding with serum chromatographic evidence of dextroproxyphene) equivalent to the ingestion of 25 tablets of 'Distalgesic' over a period of 20 to 25 minutes, being 12 times the normal single therapeutic dose was found by the coroner to be against a verdict of accident or misadventure. There was some evidence of the deceased suffering from depression over the three year period preceding her death, but no direct evidence that the deceased intended to take her own life. Mindful of the need for strict proof of suicide, the coroner concluded in view of the strength of the pathologist's evidence that the deceased took her own life.

On leave being granted by Woolf, J. an application for an order of certiorari was made on the grounds of:

(i) insufficiency of inquiry to found a suicide verdict; and
(ii) the facts were insufficient to prove an intention of suicide.

Held:

(i) Dictum of Lord Widgery, C.J. in *R. v. H.M. Coroner for the City of London, ex parte Barber* (1975) 139 J.P. 810; [1975] 1 W.L.R. 1310 applied. The test to be applied is whether on the evidence given in the case any reasonable coroner could have reached the conclusion that the proper answer was suicide.
(ii) The coroner applied the correct test and on the evidence he drew an inference which could have been drawn by any reasonable coroner.

Application dismissed.

Coroners Law — £50 fine for contempt committed in facie — certificate of fine to clerk of magistrates — ability of magistrates' court to enforce fine imposed by coroner — s. 13 Administration of Justice Act 1960 — Contempt of Court Act 1981 — Coroners Act 1887 s. 19(3) — inherent power to punish contempts — coroner's court an inferior court of record.

In the course of the inquest into the death of Helen Smith which had attracted a great deal of publicity the applicant and father of the deceased made an allegation of murder to the gallery and press. Having heard counsel for the applicant the coroner expressed the view that the manner in which the allegation was made was wholly unacceptable and constituted a contempt. The applicant was fine £50 and a certificate to that effect was delivered to the clerk of the magistrates' court. The applicant took no step to appeal pursuant to s. 13 Administration of Justice Act 1960. On the applicant's application for judicial review three issues were raised:
(i) Was what occurred a contempt?
(ii) If it was, had the coroner any jurisdiction to try and punish it?
(iii) Has the magistrate any power to collect the fine?

On application for judicial review.

Held: (i) It was not open to the applicant in these proceedings to pursue the ground that the action complained of was not a contempt; (ii) A Coroner's Court is an inferior court of record which has the power to commit for contempt in the face of the court.

The third question was not argued. In an obiter dictum the court expressed the view that it would be remarkable, if a fine having been properly imposed by the coroner, there should not be a machinery to collect it.

R. v. H.M. Coroner for the Eastern District of the Metropolitan County of West Yorkshire, ex parte Ronald Smith Q.B.D. 97

Coroners Law — second post-mortem on behalf of the family of deceased before inquest — refusal of permission by coroner — power to require post-mortem examination not exclusive to coroner — jurisdiction over the body — requirement for consent of coroner — coroner to have good grounds for refusing request — coroner no power to direct who is to perform second post-mortem.

The coroner assumed jurisdiction over the body of the deceased who died in the evening of Saturday August 3, 1985. The deceased had been discovered unconscious in a cell at a police station shortly before his death. On making inquiries on Monday August 5, the solicitor acting for the widow was informed that a post-mortem examination was to take place that morning. There was insufficient time for arrangements to be made for the widow to be represented at the post-mortem and later the same day inquiries were made at the coroner's office about the arrangements for a second post-mortem. After the inquest had been opened on Tuesday August 6, arrangements for the second post-mortem were made for Monday August 12, but on Friday August 9, the coroner refused her permission.

The coroner sought to justify the refusal on the following grounds:
(i) the second post-mortem could interfere with the post-mortem already ordered in that the pathologist instructed by the coroner might wish to conduct further tests and would be hindered from doing so;
(ii) the applicant should have sought an adjournment of the first post-mortem to give her time to be represented thereat and that having failed to make such a request the applicant was in some way precluded from having a second post-mortem; and
(iii) the fundamental inquisitorial nature of an inquest would be changed to that of a trial if

persons such as the applicant were to be allowed to arrange their own post-mortem examination.

On application for judicial review of the decision of the coroner.

Held:

(i) The inquisitorial nature of the inquest is not affected by permitting a further post-mortem examination to be carried out on behalf of someone with as close an interest as the applicant (widow).

(ii) The power of the coroner to order post-mortems is not exclusive.

(iii) The consent of the coroner is required for a further post-mortem examination as he is at the material time the person having the lawful possession of the body.

(iv) In the circumstances there was no evidence to suggest that a coroner could properly refuse the request of the applicant.

Case referred to in judgment: *R. v. Bristol Coroner, ex parte Kerr* [1974] 1 Q.B. 652.

R. v. H.M. Coroner for Greater London, ex parte Ridley Q.B.D. 657

COUNTY COURTS

County court — injunction to restrain molestation or assault — breach — whether to defer contempt proceedings where criminal charge being separately pursued and defendant on conditional bail.

The plaintiff obtained an injunction restraining the defendant from molesting or assaulting her or coming near her home. In breach the defendant entered her home, assaulted her and damaged her property. She applied for his committal for contempt but the Judge declined to hear the case because the police had preferred a criminal charge in respect of the assault and because the defendant was subject to conditional bail which further protected the plaintiff. The plaintiff appealed.

Held: that the contempt is quite separate from the criminal jurisdiction and the adjournment of contempt proceedings was a wrong exercise of discretion. *Szczepanski v. Szczepanski* (1985) Fam. Law Reports, 468, C.A., followed.

Direction that the application be heard as soon as possible.

Appeal: to Court of Appeal against refusal by county court Judge to hear an application for committal for contempt.

Caprice v. Boswell C.A. 703

CRIMINAL LAW

Alibi notice — use as part of prosecution case — circumstances in which permissible — propriety of procedure whereby prosecution allowed by trial Judge to adduce evidence of failure of witnesses named in alibi notice to keep appointments with police for interview.

The defence served notice of alibi on the prosecution. The police made appointments to interview the persons named in the alibi notice. Three appointments were made. On the first occasion, not one of the witnesses kept the appointment. On the second occasion, none appeared for interview, although one arrived late after the police officer had left, and on the third occasion the police officer was unavailable through illness and the interviews were cancelled. At the trial, the learned Judge permitted the alibi notice to be adduced as part of the prosecution's case. The defence appealed on three grounds:

1. it was unfair to allow the prosecution to adduce the alibi notice as part of their case;
2. the Judge erred in permitting the prosecution to adduce evidence of failure of the witnesses named in the alibi notice to keep appointments with the police;
3. the Judge misdirected the jury by failing to direct them as to the possibility of mistake as to dates concerned by witnesses called by the defence in support of the alibi and that he failed to remind them of the specific weaknesses of one witness's identification evidence.

Held: 1. Although, rarely, there may be cases where it would be wrong to seek to put in the alibi notice as part of the prosecution's case, in the great majority of cases there is no valid reason why this should not happen.

2. Section 11(4) of the Criminal Justice Act 1967 permits evidence tendered to disprove an alibi to be given before or after evidence is given in support of the alibi, subject to any direction of the Court as to the time it is to be given.

3. The Judge's summing up on the two matters raised by the defence as possible misdirections was meticulous.

4. The appeal against conviction should be dismissed.

Appeal: Against conviction for attempted robbery and assault with intent to rob.

R. v. Rossborough C.A. 529

Appeal against summary conviction — whether on appeal against conviction for full offence, Crown Court has power to substitute conviction for attempt.

The applicant was convicted by the Bolton justices of making off without payment contrary to s. 3(1) of the Theft Act 1978. On his appeal against conviction the Crown Court found that no offence had been committed under s. 3(1) but that he was guilty of an attempt to commit that offence and accordingly convicted him of an offence under s. 1(1) of the Criminal Attempts Act 1981. On application for judicial review:

Held: The powers of the Crown Court in dealing with an appeal against conviction by justices were the same as those of the justices at the summary trial. Save as expressly authorized (e.g. in the provisions of Part 4 of Sch. IV to the Road Traffic Act 1972) justices had no power to substitute an alternative charge for that which appeared on the information before them. In the present case, by virtue of s. 9(1) and (2) of the Magistrates' Courts Act 1980 the justices, on an information alleging the commission of the full offence, had no power to convict the applicant of an attempt to commit that offence, and the powers of the Crown Court on appeal were similarly limited. Accordingly an order of certiorari would be granted and the conviction of the Crown Court quashed.

Application: for judicial review of a decision of the Manchester Crown Court whereby on appeal by Clifford Samuel Paul Hill against his conviction for an offence undcer s. 3(1) of the Theft Act 1978, he was convicted of attempting to commit that offence.

Attempted handling of stolen goods — defendant believing goods were stolen — prosecution unable to prove whether goods stolen — whether offence committed under s. 1 of the Criminal Attempts Act 1981.

The respondent, Bernadette Ryan, was charged with dishonestly attempting to handle a video recorder knowing or believing it to be stolen, contrary to s. 1(1) of the Criminal Attempts Act 1981. The prosecution did not adduce any evidence that the goods had been stolen but the justices found that the respondent believed the video recorder was stolen property. The justices accepted a submission of no case to answer on the ground that it was essential that the prosecution should prove that the goods were stolen goods and dismissed the charge. On appeal by way of case stated:

Held: On the state of the law prior to the Criminal Attempts Act 1981 what had occurred in the present case was insufficient to amount to an attempt. The only question was whether the Act had converted the respondent's conduct into an attempt. It was not possible entirely to reconcile the wording of all the sub-sections of s. 1 of the Act but it was plain that if it had been possible to prove positively that the goods were not stolen goods the case would have fallen into s. 1(2) because the commission of the full offence would then have been impossible. That being so, the suggestion that there must be an acquittal if the position had remained open and therefore there might have been the commission of the full offence, was unacceptable and could not be attributed to Parliament.

One interpretation of the section was that the acts which were required to be proved to have been done by an accused were only part of the offence and an offence was uncompleted unless all the facts existed which the prosecution needed to prove to establish the commission of the full offence. Since to prove the full offence it was necessary to show that the goods were stolen, an inability to prove that ingredient meant that the facts did not exist or could not be shown to exist which constituted the full offence. Whichever way the matter was approached the case could and should be brought fairly within s. 1(1) and (2) of the 1981 Act and the justices were wrong to dismiss the information. As the defence solicitor in the magistrates' court intimated that he had no intention of calling any evidence if his submission was overruled, the case would be sent back to the justices with a direction to convict.

Appeal: by way of case stated by the Greater Manchester justices in respect of their finding of no case to answer on a charge of attempted handling of stolen goods in circumtances where the prosecution were unable to prove that the goods were stolen.

Attempted handling of stolen goods — defendant believing goods were stolen when in fact they were not stolen — whether offence committed under s. 1 of the Criminal Attempts Act 1981.

The appellant was charged with dishonestly attempting to handle a stolen video recorder knowing or believing it to be stolen contrary to s. 1(1) of the Criminal Attempts Act 1981. The prosecution could not prove that the video recorder had been stolen but the justices found that at the time she received it the appellant believed it was stolen. Overruling a submission by the

prosecution that on the facts the appellant was guilty of the offence charged, the justices dismissed the charge. On appeal by way of case stated the Divisional Court sent the case back to the justices with a direction to convict, but certified that it gave rise to a point of law of general public importance.

On leave to appeal being given by the House of Lords:

Held (Lord Edmund-Davies dissenting): Where a person dishonestly handles goods in the belief that they are stolen goods but those goods are not in fact stolen, that person is not liable to be convicted of attempting dishonestly to handle stolen goods contrary to s. 1 of the Criminal Attempts Act 1981. It being conceded in the present case that the video recorder had not been stolen, the appeal would be allowed and the order of the Divisional Court set aside.

Appeal: from a decision of the Queen's Bench Divisional Court (reported *sub nom: Chief Constable of Greater Manchester Police v. Ryan* (1985) 149 J.P. 79) allowing an appeal by way of case stated by the Greater Manchester justices against their dismissal of a charge against the appellant that she dishonestly attempted to handle stolen goods and directing the justices to convict.

Committal for trial on bail — forfeiture of surety's bail recognizance by Crown Court — whether Divisional Court has power to review forfeiture order or whether jurisdiction excluded under s. 29(3) of the Supreme Court Act 1981 as being "a matter relating to trial on indictment".

On June 28, 1982, the appellant John Herbert Smalley entered into a recognizance in the sum of £100,000 for his brother Ian Smalley who was committed by the Warwick magistrates' court for trial at the Warwick Crown Court on conditional bail charged with offences under s. 68(2) of the Customs and Excise Management Act 1979. Having been given due notice under r. 21 of the Crown Court Rules 1982 that the Crown Court proposed to consider estreating that recognizance, the appellant appeared before the Warwick Crown Court on July 15, 1983, where, after hearing representations on his behalf, the court ordered that the whole amount of the appellant's recognizance be estreated.

Upon application to the Divisional Court for an order of certiorari to quash the forfeiture order a preliminary objection was taken on behalf of the Commissioners of Customs and Excise as respondents that the Divisional Court had no jurisdiction to entertain the application on the ground that it was "a matter relating to trial on indictment" and accordingly excluded from the jurisdiction of the High Court under s. 29(3) of the Supreme Court Act 1981. The Divisional Court held itself bound by the Court of Appeal's decision in *R. v. Sheffield Crown Court, ex parte Brownlow* (1981) 145 J.P. 1; [1980] Q.B. 530 to uphold the respondents' objection, and refused the application.

On leave to appeal being granted by the House of Lords:

Held: An order estreating the recognizance of a surety for a defendant committed for trial at the Crown Court was not a decision affecting the conduct of a trial on indictment and so was not a matter "relating to trial on indictment" within the meaning of the exclusionary clause in s. 29(3) of the Supreme Court Act 1981. Accordingly the appeal would be allowed and the appellant's application for judicial review remitted to the Divisional Court to be heard on its merits.

Appeal: from a decision of the Queen's Bench Divisional Court (reported (1984) 148 J.P. 708) refusing an application for judicial review of an order of the Warwick Crown Court estreating the bail recognizance of John Herbert Smalley, on the ground that the Divisional Court's jurisdiction was excluded under s. 29(3) of the Supreme Court Act 1981.

Community service order — whether order takes effect when pronounced or whether it is a prerequisite that a copy of order be given to offender — Powers of Criminal Courts Act 1973, s. 14(6).

Both cases raise the point as to when a community service order comes into force and in particular whether it is a prerequisite of the effectiveness of such an order that the offender should be given a copy of the order, so that there can be no breach of the requirements of the order until that has been done.

In *Walsh v. Barlow* at Gainsborough magistrates' court on June 7, 1983 a community service order was made against the defendant with his consent, but a copy of the order was not served upon him until September 6, 1983, when he appeared before the court for breach of the requirements of the above order. At the adjourned hearing of the breach proceedings on October 21 the justices overruled a submission by the defence that the community service order was not effective until the copy had been served on the defendant on September 6, and therefore there could be no breach of the requirements before that date. The defendant was fined £20 and the order allowed to continue.

In *Thorpe v. Griggs* a community service order was made against the respondent on September 7, 1983, by Beverley Crown Court on appeal from the magistrates' court, but a copy of the order was not served upon him. In subsequent proceedings against the respondent for breach of the requirements of the order the justices for the division of Epworth and Goole were of opinion that service of the order upon him was a condition precedent to the effectiveness of the order and accordingly dismissed the information alleging a breach of the requirements. On appeal in each case by way of case stated:

Held: The provision in s. 14(6) of the Powers of Criminal Courts Act 1973 that the court "shall" forthwith give copies of the community service order to a probation officer assigned to the court and that he "shall" give a copy to the offender, was purely directory providing for certain administrative steps to be taken, and was not a prerequisite to the coming into force of the order. The order was effective as soon as the court had pronounced the sentence and from that time, the offender, having already consented to it, was subject to it. Accordingly in each of the two cases the offender was liable to proceedings for breach under s. 16 of the Act.

Appeals: by way of cases stated by the Gainsborough justices and the Epworth and Goole justices raising the question as to whether it was a prerequisite of the effectiveness of a community service order that a copy of the order should be given to the offender.

Walsh v. Barlow and Thorpe v. Griggs Q.B.D. 65

Conspiracy — matter for jury whether acts could have another explanation or not.

The appellants and another man, Scarborough, were tried for robbery of a jeweller's shop. The appellants were convicted at the Central Criminal Court of having an imitation firearm with intent, at the time of the robbery. An employee of the jeweller stated that King had been holding a stick similar to a pickaxe and another of the robbers had held what appeared to be a double-barrelled shotgun with dents on the end of the barrel and the butt end covered with material. Two metal pipes bound together with red tape were found in Morris's car a week after the offence when Morris and Scarborough were present.

The question raised in the appeal is: whether the two metal pipes bound together with tape and carried by one of the robbers under his clothing or similar material so as to look like the barrel of a shotgun, constituted an imitation firearm.

After the robbery the police saw King's car, the other two defendants in it, near his home. They were arrested and balaclavas and other items were found in the car which were identified by the jeweller's employee. It was left to the jury to decide if this was evidence of a conspiracy to rob.

Held: 1. Section 18(1) of the Firearms Act 1968 makes it an offence for a person to have a firearm with him with intent to commit an indictable offence. Section 57 of the Act defines "imitation firearm" as "...any thing which has the appearance of being a firearm... whether or not it is capable of discharging any shot, bullet or other missile", a firearm being "...a lethal barrelled weapon of any description... any component parts of such a... weapon".

Section 18 is not a "use" section and the state of mind of the accused is a separate element of the offence as is the intention of the manufacturer. The issue is whether the thing looked like a firearm at the time the accused had it with him: that is a matter for the jury to consider having seen the thing and heard the evidence of witnesses, where available. The subsection stated that the offence is committed if the accused had the necessary intent while he had the firearm or imitation firearm with him. There was accordingly no error in the Judge's summing up on this question.

2. On the conspiracy count, it is essentially a matter for the jury whether the matters to which reference had been made were overt acts of conspiracy or susceptible of some other explanation. The Judge's summing up dealt with the points fairly and there was therefore no substance in the ground of appeal.

Criminal bankruptcy order — whether such an order may be appealed against — whether such an order may be made following conviction for conspiracy in respect of particular offences which form a part of the conspiracy.

The appellant was convicted at Snaresbrook Crown Court on offences of conspiracy to steal and conspiracy to rob. Before imposing a criminal bankruptcy order the trial Judge was satisfied that the conspiracies involved, and the appellant had participated in, certain specific offences of burglary and robbery.

Held: (1) Section 40(1) of Powers of Criminal Courts Act 1973 in providing that — "no appeal shall lie against the making of a criminal bankruptcy order" should be construed as prohibiting appeals questioning the use of the court's discretion but not appeals questioning whether the court has exceeded its power in making an order.

(2) It is open to the Crown Court to find that a conspiracy has resulted in loss or damage to others in circumstances where the immediate cause of the loss is a crime which constitutes an overt act of the conspiracy.

(3) Whether loss or damage did result from a particular offence is a matter of fact for the sentencing Judge to determine.

Appeal: by Douglas Roy Cain against the dismissal by the Court of Appeal (Criminal Division) of his appeal from the criminal bankruptcy order made against him by the Crown Court.

Diminished responsibility — "borderline of insanity" is not always the test — not appropriate direction in depressive illness.

The appellant was convicted of the murder of his wife after pleading guilty to manslaughter, raising a defence of provocation and diminished responsibility to the murder charge. The prison medical officer gave evidence in support of the appellant's plea, that he was suffering from chronic reactive depression amounting to an abnormality of mind, within the meaning of s. 2 of

the Homicide Act 1957, that substantially impaired his mental responsibility at the time of the killing. The consultant psychiatrist called by the prosecution, agreed with the diagnosis but in his opinion it was not so severe as to impair the appellant's mental responsibility.

The Judge directed the jury on the test of diminished responsibility, following a passage in *R. v. Byrne* (1960) 44 Cr. App. R. 246, as being whether the appellant could be described in popular language as partially insane or on the borderline of insanity.

Held: In *R. v. Rose* (1961) 45 Cr. App. R. 162 Lord Tucker, referring to the test of partial insanity in *R. v. Byrne*, "The Court of Criminal Appeal was (not) intending to lay down that in every case the jury must necessarily be directed that the test is always to be the borderline of insanity... there is no formula that can safely be used in every case — the direction of the jury must always be related to the particular evidence that has been given and there may be cases where the words 'borderline' and 'insanity' might not be helpful". In a case dealing with depressive illness it is not appropriate to direct a jury solely in terms of partial or borderline insanity and might not be helpful at all.

Following the evidence of the prison medical officer, that reactive depression could not be described as insanity, and in view of the Judge's direction, the jury was bound to find the defence of diminished responsibility not made out. There was therefore a material misdirection, and the appeal is allowed and a conviction of manslaughter submitted for that murder.

Appeal: by John Samuel Seers against conviction for murder on the grounds that the Judge misdirected the jury on the issue of diminished responsibility.

R. v. Seers C.A. (Crim. Div.) 124

Explosive Substances Act 1883 — section 4 — whether "lawful object" to be defined by English law — construction of guilty intent — burden on defendant.

The respondent and another man, named Smith, were tried at Chelmsford Crown Court on an indictment which included a charge under s. 4 of the Explosive Substances Act 1883. The respondent made explosive timers, designed to detonate time-bombs, which were produced by a company owned and managed by Smith. The respondent exported to and had contacts in Syria and Lebanon. There was virtually uncontradicted evidence that the timers had been designed for use in terrorist activities. The respondent was convicted, but the jury failed to agree a verdict on Smith, who was therefore retried. The Judge, at the subsquent trial, ruled that "the lawfulness of the object shall be determined by reference to whether the defendant knew that someone into whose hands these timers would pass, intended to use them within the jurisdiction in breach of the laws of England." On the basis of this ruling the prosecution offered no evidence, and Smith was discharged. The respondent appealed successfully to the Court of Appeal (Criminal Division) against his conviction.

The question raised as a point of law in this appeal is: "Whether on a true construction of s. 4 of the Explosive Substances Act 1883 the lawful object specified therein is confined to an object taking place in the United Kingdom the lawfulness of which is to be defined by English law."

Held: 1. Section 4(1) of the Explosive Substances Act 1883 creates an offence which comprises the guilty act of making, possessing, or being in control of explosive substances; and the guilty state of mind that the circumstances "give rise to a reasonable suspicion that he is not making it or does not have it... for a lawful object". The guilty conduct is the relevant act, not its result, and since timers are "explosive substances" within the definition in s. 9(1) of the Act the conduct required by s. 4(1) was established.

2. The critical words relating to the guilty state of mind refer to a reasonable suspicion that the acts are not for a lawful object, this is a question of construction, not jurisdiction. Lawful object will be negated where there is a lack of knowledge by the defendant that manufacture was for a lawful purpose. Once the Crown has established this, and the guilty conduct, the burden of proof

will rest with the defendant, to show on a balance of probabilities, that his conduct had a lawful object. The legislature provided for this purpose, in s. 4(2), the at that time special privilege, of allowing the defendant to give evidence in his own defence.

3. The appeal was allowed, the respondent's conviction restored and the certified question answered in the negative.

Appeal: from the Court of Appeal (Criminal Division) on a point of law on the construction of s. 4 of the Explosive Substances Act 1883.

R. v. Berry H.L. 276

Harbouring prisoner — remand prisoner escaped from police station yard while awaiting return to remand centre — whether amounts to escape from "prison" — Criminal Justice Act 1961, s. 22(2).

The appellant Ian Charles Nicoll was charged with knowingly harbouring a person who had escaped from prison or other institution to which s. 39 of the Prison Act 1952 applies, namely Anthony Stephen Paver, contrary to s. 22(2) of the Criminal Justice Act 1961. The facts of the case were that on the day of his escape Paver had been taken in police custody from a remand centre to a magistrates' court where he was further remanded in custody on a charge of burglary. He was then taken from the court by a police van to the local police station to be held in police cells pending his return to the same remand centre. When the van arrived at the police station yard Paver escaped and took refuge in the appellant's house.

At his trial the appellant accepted that he had harboured Paver but it was submitted on his behalf that the police station yard from which he had escaped was not a prison or other institution to which s. 39 of the 1952 Act applies. The prosecution submitted, and the justices accepted, that at all material times the escapee had notionally remained in the remand centre from which he had been brought and to which he was being returned. The appellant was convicted.

On appeal by way of case stated:

Held, allowing the appeal and quashing the conviction: Section 22(2) of the Criminal Justice Act 1961 dealt closely with the liberty of the subject and had to be construed strictly. On the facts found by the justices Paver had not escaped from a prison or other institution (which included a remand centre) to which s. 39 of the Prison Act 1952 applies, but from the police station yard. The justices were wrong in accepting the prosecution submission that he had notionally remained in detention at the remand centre and s. 13(2) of the Prison Act 1952 which deemed a prisoner to be in legal custody while being taken to or from a prison (including a remand centre) could not be invoked in support of that contention.

Appeal: by way of case stated by the Morley justices in respect of their conviction of Ian Charles Nicoll for an offence under s. 22(2) of the Criminal Justice Act 1961.

Nicholl v. Catron Q.B.D. 424

Insanity verdict — where insanity is not raised by defence — where Judge can raise the issue — safeguards to be observed.

The appellant, a man aged 74, of previous good character, was tried at Acton Crown Court on an indictment containing two counts of arson, in which it was alleged he set fire to a number of articles, belonging to himself, in his basement flat and at the same time damaged parts of the flat. The jury, having been directed by the Judge that it could make such a finding, found the

appellant not guilty on both counts by reason of insanity, and he was ordered to be admitted to a safe hospital.

Firemen who had attended the fire gave evidence that when they arrived the appellant was watching a silent, blank television set, and appeared unconcerned; rubbish was burning in a wastepaper basket and the carpet and floor were burnt. When spoken to he appeared lucid and normal, but admitted lighting the fire, maintaining it was a normal and safe thing to do. The prosecution did not bring medical evidence or suggest that the appellant was other than normal and sane; the defence introduced medical evidence to show that the appellant had been treated for hypomania (manic-depressive psychosis) for a few years, but was not at that time taking treatment, and therefore did not know that what he was doing was wrong. Following the medical evidence and questions by the Judge and counsel for the prosecution about hypomania, the Judge informed both counsel that he would allow the jury to decide whether to return a verdict of not guilty but insance. Both counsel submitted that this was inappropriate. The question on appeal is whether the jury was entitled to return such verdict where insanity was not suggested by the prosecution or raised as a defence.

Held: It cannot be said that there are no circumstances in which a Judge may not of his own volition raise an issue of insanity, and leave it to a jury, provided there is relevant evidence going to all the factors involved in the *M'Naghten* test. Such circumstances will be exceptional and very rare, and the Judge must ensure that counsel for both sides have ample opportunity to call all necessary evidence in the light of his intention to raise the issue.

There is no precedent that the prosecution has any right to raise such an issue — its duty is to prove if it can the allegation in the indictment, and rebut any defence raised, and to make any evidence, for instance of insanity, available to the defence.

In thise case it was not clear that there was available evidence to establish all the factors making up the *M'Naghten* rules, and the Judge did not give the prosecution and defence an opportunity to call further evidence. The verdicts were accordingly set aside.

Appeal: against a verdict of not guilty by reason of insanity at Acton Crown Court, where insanity was not raised by counsel for the defence nor suggested by the prosecution.

R. v. Dickie 1

Jurisdiction to review Crown Court decision to revoke legal aid order — autonomy of Crown Court in matters relating to trial on indictment — extent of that jurisdiction.

The applicants together with a Mr. K.N. Kukoyi were arrested for importing cannabis contrary to s. 3(1) of the Misuse of Drugs Act 1971 and s. 17(2) of the Customs and Excise Management Act 1979, and have been committed to the Crown Court for trial. Initially a firm of solicitors in Crawley acted under legal aid for the defendants but the defendants later signed a letter asking for a Mr. Ashraf Karim, a solicitor with Laxmans in London, to represent them. An application was subsequently made to the bench by the defendants for the legal aid certificate to be amended to substitute the firm of Laxmans for the previous firm. The Bench would not accede to this, and Mr. Kukoyi remained with the existing solicitors named in the order, but the applicants declined and their legal aid order was revoked. Further applications for legal aid, to the Crown Court at Chichester, and to a Judge in chambers, were subsequently refused. The applicants seek an order of certiorari to quash that decision and an order of mandamus requiring the Crown Court to consider legal aid as requested.

Held: The jurisdiction of the High Court to make orders of mandamus, prohibition or certiorari in relation to the Crown Court specifically excludes, in the Supreme Courts Act 1981, "matters relating to trial on indictment". Shaw, L.J. stated in *R. v. Sheffield Crown Court, ex parte Brownlow* (1981) 145 J.P. 1; [1980] 1 Q.B. 530 that, "the phrase 'trial on indictment' is a general

reference not to a specific event or occasion but to a jurisdiction. Any decision as to a matter which arises out of, or incidentally to, or in the course of that jurisdiction whether it relates to a proximate trial or a remote one falls... inescapably and inevitably into the immunity from review by the High Court".

The Legal Aid in Criminal Proceedings (General) Regulations 1968 provide that the refusal of the grant of legal aid in the Crown Court can only be made by a Crown Court Judge. Such a decision arises from his jurisdiction in matters relating to trial on indictment, which is not subject to the review of any court and is paramount and final. This encompasses all matters arising out of or connected with that jurisdiction.

The Queen's Bench Divisional Court had no jurisdiction to hear this application, which was accordingly dismissed.

Application: by Kayode Shola Abodunrin and Tunji Taofee Sogbanmu for orders of certiorari and mandamus to quash the refusal of legal aid and require the Crown Court at Chichester to consider the application afresh, or grant legal aid as requested.

R. v. Chichester Crown Court, ex parte Kayode Shola Abodunrin and Tunji Taofee Sogbanmu Q.B.D. 54

Jurisdiction to try accused who has allegedly been illegally deported to the United Kingdom — power of Divisional Court to inquire into circumstances in which he was found in this country.

The applicant, an Australian citizen, who was suspected of murder committed in Plymouth on April 2, 1984, left this country the following day and was traced to Turkey a few weeks later where he was detained by Turkish police, questioned and finger-printed in connexion with the murder which he denied committing. The Turkish authorities were told that the British police had no authority to request the applicant's extradition or deportation but that if it was within their powers to deport him to the United Kingdom it would assist the police to interview him. The Turkish authorities decided to expel him "United Kingdom direction" and arrangements were made for his flight to London where he was met and arrested by the police. He was later charged with murder and appeared before Plymouth magistrates' court on committal proceedings. On application being made to the Divisional Court for an order of prohibition directing the magistrates' court not to proceed with the committal proceedings and for an order of certiorari to quash the charge:

Held: The court had jurisdiction to proceed with the committal proceedings as the applicant had been lawfully arrested within its jurisdiction and the Divisional Court had no power to inquire into the circumstances in which a person was found within the jurisdiction for the purpose of refusing to try him. In reaching this decision the Divisional Court would follow *R. v. Officer Commanding Depot Battalion R.A.S.C., Colchester, ex parte Elliott* [1949] 1 All E.R. 373, and the case of *R. v. Bow Street Magistrates, ex parte Mackeson* (1981) 75 Cr. App. R. 24, insofar as it decided that the Court had a discretion to grant prohibition in the exercise of its inherent jurisdiction, would be regarded as a decision *per incuriam*.

Application: for judicial review seeking an order of prohibition to prohibit Plymouth magistrates' court from proceeding with committal proceedings against Andrew Michael Driver and an order of certiorari to quash the charge of murder and to order his discharge.

R. v. Plymouth Magistrates' Court and Others, ex parte Driver Q.B.D. 465

Manslaughter — direction of Judge as to what could constitute 'harm' for this purpose challenged — further direction as to the approach to be taken by the jury challenged — appeals against sentence on charges of robbery and attempted robbery considered.

In February 1982, three men attempted to rob a filling station. The attendant there pressed an alarm button and the men fled. The attendant, who suffered from heart disease, died within minutes. Almost one year later, in January 1983, one of the defendants confessed. All three were interviewed and charged. At the trial, medical evidence was called. Two doctors gave evidence that it was possible, but not probable, that independently of the attempted robbery, the defendant could have suffered a major heart attack which caused his death. The trial Judge's failure to withdraw the case from the jury, his directions to the jury on the meaning of harm, the burden of proof and the standard of proof were challenged before the Court of Appeal.

Appeal: By all three defendants against conviction for manslaughter and sentence on that and other charges.

Held: 1. For the purposes of manslaughter, the requisite "harm" can be caused if an unlawful act so shocks the victim as to cause him physical injury.

2. The Judge's directions to the jury upon this matter, and another matter particular to the facts of this case, were such that the convictions for manslaughter were unsafe and unsatisfactory and would therefore be quashed.

3. Appeals against sentence on other charges dismissed.

4. Application for a certificate that a point of law of general public importance was involved refused.

R. v. Dawson, Nolan and Walmsley C.A. 513

Meaning of the word "conviction" in relation to the finding of guilt by a jury — power to allow change of plea before sentence.

Upon arrangement for trial with four other persons, the accused (who was fearful as to the likely repercussions for his family if a joint trial took place) applied for a separate trial. This application was refused. Even though upon counsel's instructions there was a defence to the charge, the defendant, against advice, insisted on entering a guilty plea.

The trial continued in relation to the other defendants, but ended prematurely when the jury had to be discharged. A new jury was empanelled and the trial against the other defendants began again. They were convicted. The defendant, through his counsel, then sought leave to change his plea to 'not guilty'. The Judge held he was powerless to allow a change of plea where the verdict had been pronounced by the jury, and declined to rule how he would have exercised his discretion had he felt that he had such power. He agreed to defer the passing of sentence until the conclusion of this appeal which was intimated to him would be pursued.

Appeal: Against the refusal of the trial Judge to allow the defendant to change his plea of 'guilty' to one of 'not guilty', the original plea having been accepted by the court and the jury having pronounced upon it.

Held: 1. A discretion exists to allow a change of plea at any time before sentence, even if a jury has accepted a plea of guilty; 2. Generally speaking, it will be inappropriate to seek to appeal until sentence has been passed; 3. In this case, on its facts, the trial Judge, had he exercised his discretion judicially, would have been bound to refuse the appellant's application to change his plea. The proviso to s. 2 of the 1968 Act would therefore be applied and the appeal dismissed.

R. v. Drew C.A. 642

Mental element in murder — meaning of intention — relevance of foresight of consequences — guidance on direction to juries in cases involving specific intent.

The appellant was convicted of the murder of his step-father arising out of the firing of a shotgun, and appealed against his conviction. In dismissing his appeal the Court of Appeal (Criminal Division) certified that the following point of law of general public importance was involved.

"Is malice aforethought in the crime of murder established by proof that when doing the act which causes the death of another the accused either:

(a) intends to kill or do serious harm, or

(b) foresees that death or serious harm will probably occur, whether or not he desires either of those consequences?"

On leave to appeal being granted by the House of Lords.

Held: 1. The mental element in murder requires proof of an intention to kill or cause really serious injury and there was no rule of substantive law that foresight by the accused of one of those eventualities as a probable consequence of his voluntary act, where the probability could be defined as exceeding a certain degree, was equivalent or alternative to the necessary intention. Foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belonged, not to the substantive law, but to the law of evidence. Where a crime of specific intent was under consideration the probability of the consequences taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent.

2. In directing a jury on the mental element necessary in a crime of specific intent, the Judge should avoid any elaboration or paraphrase of what was meant by intent and leave it to the jury's good sense to decide whether the accused acted with the necessary intent unless some further explanation or elaboration was strictly necessary to avoid misunderstanding arising out of the facts or presentation of the case.

3. In the rare cases in which it was necessary to direct a jury by reference to foresight of consequences, it was only necessary to invite the jury to consider two questions: (1) was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? and (2) did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it was a proper inference for them to draw that he intended that consequence.

Per Lord Hailsham of St. Marylebone, L.C.: I conclude with the pious hope that your Lordships will not again have to decide that foresight and forseeability are not the same thing as intention although either may give rise to an irresistible inference of such, and that matters which are essentially to be treated as matters of inference for a jury as to a subjective state of mind will not once again be erected into a legal presumption. They should remain, what they always should have been, part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not part of the substantive law.

Appeal allowed, certified question answered in the negative, verdict of manslaughter substituted for that of murder and case remitted to the Court of Appeal (Criminal Division) for sentence.

Appeal: by Alistair Baden Roy Moloney from a decision of the Court of Appeal (Criminal Division) dismissing his appeal against conviction on a charge of murder.

Obscene publications — information alleging possession of five obscene articles for publication for gain — whether bad for duplicity.

The defendant was charged on one information alleging that he had certain obscene articles, namely five video tapes, for publication for gain, contrary to s. 2(1) of the Obscene Publications Act 1959 as amended. At his trial before the justices his solicitor conceded that all the five tapes were obscene but submitted that they were not in the defendant's possession for publication for gain. The justices convicted the defendant and ordered the forfeiture of all the tapes. On his appeal against conviction to the Crown Court the Judge upheld a submission on his behalf that the information was bad for duplicity and declined to hear the appeal on its merits. On application for judicial review:

Held: Applying the test in *Jemmison v. Priddle* (1972) 136 J.P. 230; (1972) 56 Cr. App. R. 299 the information charged only one criminal activity, namely, having obscene articles for publication for gain, and accordingly it was not bad for duplicity.

Per curiam: On a trial on indictment alleging the possession of a number of obscene articles for publication for gain the prosecution would be well advised to charge each article in a separate count. If all the articles were referred to in a composite count the jury would be entitled to convict even though they were satisfied that not every article was obscene and a practical difficulty would then arise as to which articles had been found obscene for the purpose of making an order of forfeiture. If there was no concession on the part of the defendant that all the articles referred to in a composite count were obscene it might be that no order of forfeiture could be made.

Application: for judicial review of a decision of the Judge at Bristol Crown Court at the hearing of an appeal by Terence Raymond Purnell against his conviction by Avon North justices for an offence under s. 2(1) of the Obscene Publications Act 1959 as amended, that the information was bad for duplicity.

R. v. Bristol Crown Court, ex parte Willets Q.B.D. 416

Prosecution's duty in proving perjury — construction of s. 1(1) Perjury Act 1911.

The appellant was a police officer charged with perjury contrary to s. 1(1) of the Perjury Act 1911 before the Crown Court at Stafford. He originally pleaded not guilty, but changed his plea to guilty after submissions at the close of the prosecution case were rejected by the Judge.

The appellant had been involved in stopping a car with two Indians in it. He asked the driver (whom he knew by sight only) for his driving documents; none were forthcoming and he was therefore issued with a form requesting production at a police station. The driver gave his name as Parshan Singh, and in due course he produced documents at the police station. The appellant later saw Parshan Singh and told him that he was satisfied that Manjit Singh and not Parshan had been the driver of the car, and that he had given a false name because, presumably, Manjit Singh did not hold a proper driving licence. Accordingly Manjit Singh was charged with driving offences and both he and Parshan Singh were charged with offences allegedly committed in connexion with the production of driving documents. Whilst waiting for their case to be called on, the two Indians were approached by another police officer, whom they had seen earlier on talking to the appellant, and he asked them to produce their driving documents. Parshan did, Manjit did not; however the incident struck them both as odd and they reported it to their solicitor. The prosecution case against the two Indians depended wholly on the appellant's evidence that Majit and not Parshan had been the driver of the car, and he was cross-examined on the possibility of mistaken identity. During the course of this cross-examination the appellant was asked first, whether he was aware that another police officer had approached the two defendants and asked to see their driving documents, secondly, whether or not he had asked the other officer to do this, and thirdly, whether or not the other police officer had reported back to

him after his conversation with the Indians. The appellant was lying when he denied all three of these assertions. He was then asked if he had done this in order to establish which was which because he wasn't sure. In re-examination the appellant was asked if any such conversation had taken place between him and his fellow officer which resembled that which it was suggested had taken place. Once again the appellant was lying when he denied this. However, after investigations took place, the appellant admitted his lies and consequently the charges against the two Indians were dropped. The appellant said he had done it because he suspected that Parshan and Manjit Singh were going to try and deceive the magistrates by switching identities, and when cross-examined he had panicked and lied. The submissions put before the Judge were the basis of the appellant's defence and therefore when they were rejected he had no alternative but to change his plea. They were therefore repeated to the Court of Appeal and the submissions were twofold:

(1) that there was no prima facie case that the admittedly false statements were made with the requisite guilty mind. The contention here was that the prosecution not only had to prove that the false statement was made with knowledge of its falsity or lack of belief in its truth, but also that the appellant knew or believed that the false statement was material to the proceedings, and

(2)that in any event, the false statements were not material to the proceedings. Here the suggestion was that it was the materiality of the truth, if told, which was the question in issue and that it was only where the truth if told would have affected the jury's decision that the requirement of materiality was satisfied.

Held: The appeal failed in respect of both submissions. In ascribing meaning to the word "wilfully", it was useful to look at s. 1(6) of the 1911 Act. This provides: "The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial". If s. 1(1) meant that a statement was only material when the person making it believes it to be so, then s. 1(6) becomes meaningless. Therefore the word "wilfully" in this section of the Perjury Act 1911 requires the prosecution to prove no more than that the statement was made deliberately and not inadvertently or by mistake. As to the second submission contending that a statement is only material if the truth would have affected the outcome, the matter had been correctly stated by Lord Campbell in *R. v. Lavey* 3 C. & K. 26. It is the statement which is made which must be material; in this case the lies effectively brought to a halt that line of cross-examination, which in any event undoubtedly went to the heart of the case. In the Court of Appeal's judgment, in cases under s. 1(1) of the 1911 Act the prosecution had the burden of proving to the requisite standard the following matters:

(1) that the witness was lawfully sworn as a witness;
(2) in a judicial proceeding;
(3) that the witness made a statement wilfully, that is to say deliberately and not inadvertently or by mistake;
(4) that the statement was false;
(5) that the witness knew it was false or did not believe it to be true;
(6) that the statement was, viewed objectively, material to the judicial proceedings — the last requirement being, by virtue of s. 1(6) of the Perjury Act 1911 a matter of law to be decided by the Judge.

Appeal: by Neil Frederick Millward against his conviction in November 1983 at the Crown Court at Stafford.

R. v. Millward C.A. 545

Rape — jury must be directed on "mistaken belief" — "reckless" in rape is not an objective test but concerns the defendant's response to the question of consent by the woman.

Both appellants were convicted at Stafford Crown Court of rape, being reckless as to consent, and aiding and abetting the other to commit such rape. Both were acquitted of rape knowing

there to be no consent, and of aiding and abetting such rape. The Judge directed the jury, on the state of mind requisite in "reckless" rape, that it was sufficient if it was obvious to an ordinary observer that the victim was not consenting, and gave no further direction as to the necessary elements to be proved in this type of rape.

The appeal raised two issues:

(1) that the Judge should have directed the jury that a genuine though mistaken belief that the girl was consenting offered a defence to a charge of reckless rape;

(2) that the Judge erred in referring to the "ordinary observer" test of recklessness, and should have directed that it was necessary to prove the appellant was actually aware of the possibility that the girl was not consenting.

Held: (1) It was stated by Lord Lane, C.J. in *R. v. Thomas* (1983) 77 Cr. App. R. 63 that "a mistaken belief that the woman was consenting, however unreasonable it may appear to have been, is an answer to the charge". The present case concerned a similar situation to that case, and therefore the jury were left without any guidance on the matter of belief.

(2) The judgment in *Thomas* also restated the definition of "reckless" in the context of rape offences: "a man is reckless if... he is indifferent and gave no thought to the possibility that the woman might not be consenting, in circumstances where, if any thought had been given to the matter, it would have been obvious that there was a risk she was not". The word "reckless" in the case of rape involves a different concept to other types of offence, since the forseeability is as to the state of mind of the victim.

In directing a jury on recklessness in rape, if they came to the conclusion that the defendant could not care less whether the woman wanted to have sexual intercourse, or nor, but pressed on regardless, then he would have been reckless and could not have believed that she wanted to.

The appeal was allowed on both grounds.

Appeal: by Satnam Singh and Kewal Singh against conviction at Stafford Crown Court, on a question of law relating to the direction to the jury in charges of reckless rape.

R. v. Singh and Singh C.A. (Crim. Div.) 142

Receiving stolen goods — test of knowledge — when appropriate to impose disqualification if car used for commission of offence.

The appellant, Barbara Janet Wilmott, was convicted at Winchester Crown Court of handling stolen goods. The evidence established that she had been arrested in Farnborough and 80 bottles of spirits with price labels from various supermarkets were found in the back of her car covered with an anorak. The appellant's arrest followed police observations of her activities at a house approximately half a mile from where she was arrested. She had driven from her house in Tooting to this house and was seen manoeuvring her car into a position so that its boot was facing the gate of this house, and she and a Mr. Boswell had each put a carrier bag into the boot of the car. Eventually after further discussions with Mr. and Mrs. Boswell she had driven away and was arrested about half a mile away where she had stopped to walk her dog.

The appellant's contention was that she had gone to this house because she'd been told they had "cheap booze" which she required for her son's wedding, and that it had never entered her head that the bottles might be stolen. At the end of the prosecution case the Recorder had rejected a submission of no case fit to go before the jury, and the appellant was subsequently convicted.

The appellant's appeal was against conviction on the basis first, that the Recorder had been wrong to allow the case to go before the jury, and secondly, that he had failed to direct the jury correctly on the test for proving knowledge or belief that goods are stolen. She also appealed against her sentence which was composed of a fine of £500 and a disqualification from holding or obtaining a licence to drive for two years imposed by virtue of s.44 of the Powers of the

Criminal Courts Act. She did not oppose the amount of the financial penalty, but merely the order of disqualification.

Held: 1. The appeal against conviction would be dismissed; the Recorder had been quite correct to allow the case to go before the jury since the facts revealed sufficient evidence that these must have been stolen goods. Furthermore the Judge's direction on knowledge or belief that the goods were stolen was quite clear and proper in effectively saying that a man's state of mind was to be judged from what he does and says, and how he behaves in all the circumstances.

2. The appeal against sentence would be allowed to the extent of removing the disqualifcation imposed under s. 44 of the Powers of Criminal Courts Act, since it was inappropriate to order disqualification if the use of the motor car was not essential to the commission of the offence itself, and where use of the vehicle was merely incidental to the commission of an offence a defendant should not be disqualified on conviction.

Appeal: by Barbara Janet Wilmott against conviction and sentence at Winchester Crown Court.

R. v. Wilmott C.A. 428

Recklessness — defendant aged 15 — test to be applied.

The defendant when aged 15 was convicted at the Central Criminal Court on a count of arson with intent to endanger life. In his direction to the jury on the question of recklessness the Judge decided that when applying the standard of the ordinary prudent man the jury should not take into account the particular characteristics of the defendant in question.

Held: (1) In the test of recklessness the phrase "creates an obvious risk" means that the risk is one which must have been obvious to a reasonably prudent man, not necessarily to the particular defendant if he or she had given thought to it.

(2) It is not appropriate to apply the standard that one might expect of the normal member of a class of persons to which the defendant belongs whether that class be identified by age, mental ability or any other characteristic.

Appeal: against conviction by Stephen Malcolm Rogers dismissed.

R. v. Rogers C.A. 89

Self-defence — whether available for offences under Explosive Substances Act — protection against anticipated attack — ambit of "lawful object".

The defendant owned a shop in an area which, during July 1981, was subject to extensive rioting. Following an attack on the premises, when the shop was damaged and looting took place, the defendant took certain measures to defend himself from an anticipated further attack; these measures included making petrol bombs. He was subsequently charged with offences under s. 4 of the Explosive Substances Act 1883 and s. 64 of the Offences Against the Person Act 1861. There was little dispute on the facts, the defence of self-defence being raised by the defendant; the Judge ruled against a submission by the prosecution that this defence was not available in this case. Two counts were withdrawn and the jury found the defendant not guilty on the remaining two.

The question referred to the Court is therefore whether the defence of self-defence is available to a defendant charged with those offences.

Held: The manufacture and storage of explosives are prohibited under ss. 3, 4 and 39 of the Explosives Act 1875, except under licence, and the petrol bombs were admitted to be "explosive substances" within the meaning of the 1883 Act, which made possession of such substances a felony unless the defendant can show a "lawful object". In *R. v. Fegan* (1972) N.I.L.R. 80, the question was considered by MacDermott, L.C.J. who held that the absence of a certificate or other authority may be evidence of the non-existence of a lawful object. Possession for the purpose of protecting the possessor from acts of violence *may* be possession for a lawful object and it is for a jury to determine whether the defendant held the weapon for use as protection against a genuinely and reasonably anticipated fear for his or his family's safety. "Reasonableness" relates to the immediately prevailing circumstances but there is not authority that self-defence is restricted to acts done spontaneously.

The point of law is therefore answered, that the defence of lawful object is available in respect of a charge under s. 4 of the Explosive Substances Act if the jury are satisfied that the defendant's object was by reasonable means to protect himself or his family or property from imminent apprehended attack.

Reference: by Her Majesty's Attorney General, whether the defence of self-defence is available to a defendant charged with offences under s. 4 of the Explosive Substances Act 1883 and s. 64 of the Offences Against the Person Act 1861.

In the Matter of A Reference by Her Majesty's Attorney-General under Section 36 of The Criminal Justice Act 1972. (Reference No. 2 of 1983) C.A. (Crim. Div.) 104

Sentencing for certain cases of theft and fraud by persons in a position of trust — observations by the Court of Appeal as to the principles to be followed — general guidance as to appropriate sentences.

In reviewing an appeal by the defendant in this case, against his sentence for false accounting, obtaining by deception and theft, the Court of Appeal took the opportunity of giving some general guidance to sentencers for these type of offences.

Appeal: Against 10 concurrent terms of two years' imprisonment imposed for four counts of false accounting, four counts of obtaining by deception and two counts of theft.

Held: 1. Appeal against sentence dismissed. This was a serious breach of trust. A suspended sentence would have been inappropriate. In the circumstances, the sentence was not excessive.

2. Although it is dangerous to generalize where the circumstances of the offender and the offence may vary widely from case to case, the following suggestions are offered to sentencers:

(a) in general, a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small;
(b) for amounts that are not small, but are up to £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are appropriate;
(c) cases involving sums of between £10,000 and £50,000 will merit terms of about two to three years' imprisonment;
(d) where greater sums are involved, for example those over £100,000, then a term of three and a half to four and a half years would be justified.

3. The terms suggested are appropriate where the case is contested. A discount should be given for a guilty plea.

4. It will not usually be appropriate to suspend any part of the sentence in cases of serious breach of trust.

5. The following are some of the matters the Court should take into account:
(a) the quality and degree of trust reposed in the offender including his rank;
(b) the period over which the fraud or frauds were perpetrated;
(c) the use to which the money or property dishonestly taken was put;
(d) the effect upon the victim;
(e) the impact of the offences on the public and public confidence;
(f) the effect on fellow employees or partners;
(g) the effect on the offender himself;
(h) the offender's own history;
(i) those matters of mitigation special to the offender himself, for example illness, delay in bringing the case to trial and any help given by him to the police.

R. v. Barrick C.A. 705

Sentencing — consecutive sentences imposed for offences arising from one incident — justified where circumstances demand.

The appellant was committed to Acton Crown Court for sentence, where on July 7, 1983 he was sentenced to 15 months' imprisonment and a disqualification order for driving whilst unfit through drink, 15 months' imprisonment concurrent, for taking and driving away, and 15 months' imprisonment, to operate consecutively, for driving whilst disqualified. These sentences were varied when it was realised that they exceeded the statutory maximum in respect of driving whilst unfit through drink and driving whilst disqualified for which the maximum sentences of imprisonment were six months and 12 months respectively. Accordingly the maximum sentences were imposed for these two offences and a sentence of 12 months' imprisonment imposed for taking and driving away, each sentence to operate consecutively, the result being that the total sentence had not been varied.

The appellant had numerous convictions, many involving similar charges for which he was before the court on this occasion. In this appeal against sentence it was pointed out he pleaded guilty to the charges in the magistrates' court, and since the offences arise out of one incident, relying on the case of *Jones* (1980) 2 Cr.App.R. (S) 152 is wrong to make the sentences consecutive.

Held: This case can be distinguished from *Jones* on the facts, and in this court's decision in *Wheatley* on December 1, 1983, it was held that it is not a universal rule that consecutive sentences should not be imposed for offences arising from the same incident, and when circumstances demand it consecutive sentences should be imposed.

In the circumstances of this case however the submission that the cumulative effect of the sentences is too long is upheld and the sentences varied insofar as the sentence for driving whilst disqualified will be made concurrent to the other two.

Appeal: by Vincent James Dillon against sentence imposed at Acton Crown Court on July 7, 1983.

R. v. Dillon C.A. (Crim. Div.) 182

Substantial delay in prosecution process — relevant considerations in exercising discretion to stop proceedings.

On June 9, 1981 informations were laid against the applicant in respect of six motoring offences allegedly committed on February 14, 1981, but the related summonses were not served upon him until August 30, 1983. The summonses proved to be ineffective as they did not state a return date and the applicant was subsequently arrested on warrant and appeared before the magistrates' court on April 6, 1984. When, following adjournments, the case finally came on for hearing on July 3, 1984, the defence applied for the charges to be dismissed as nearly three and a half years had elapsed since the date of the offences. After hearing evidence given by a police

officer and the applicant about the delay, the justices dismissed the defence application but gave no reasons and adjourned the case pending an application for judicial review.

Held: The power of justices to decline to hear the summonses was very strictly confined but there was no rule of thumb and the Divisional Court should be wary of creating arbitrary limitation periods in these cases. In the present case, which had to be considered as at the date of the judicial review over four and a quarter years after the alleged offences, there was very substantial delay which could not be attributed to fault on either side. The court would follow the approach adopted in *R. v. Oxford City Justices, ex parte Smith* [1982] R.T.R. 201 and *R. v. West London Stipendiary Magistrate, ex parte Anderson* (1984) 148 J.P. 683, where the essential elements in granting relief were inordinate delay and prejudice whether proved or inferred. Both elements were present here and as the delay was not excused by any fault on the part of the applicant, the decision of the justices would be quashed and further proceedings restrained.

Application: for judicial review of a decision of the Gateshead justices ordering summonses against the applicant Charles William Smith to proceed to trial.

R. v. Gateshead Justices, ex parte Smith Q.B.D. 681

DANGEROUS DRUGS

Obstruction of police officers search for drugs — construction of s. 23 Misuse of Drugs Act 1971 — whether person detained should be told reason for detention.

The appellant, James Thomas Forde, appeared before the Crown Court at Southwark and was convicted of obstructing a constable contrary to s. 23(4)(a) of the Misuse of Drugs Act 1971.

The evidence established that the appellant had been part of a group, which was observed by two police officers in a car, in a street in Soho (in an area apparently frequented by drug addicts). As the officers drove past the group they saw something being handed to the appellant. Consequently they got out of their car and walked back to the group who started to disperse as they approached. The group ignored requests to stop, and when they caught up with them one of the officers took hold of the appellant who was trying to put something in his mouth. The officer asked him to take it out, but the appellant had already swallowed it. In evidence the appellant admitted that he was a registered drug addict, and had gone to that particular area to mix with other drug addicts. However he said that he had taken nothing from any of the group, and that what he had swallowed had been two ampoules of physeptone which were part of a regular daily prescription of eight ampoules which he received lawfully from the doctor. The appellant further contended that his act in swallowing the pills had not been motivated by any intent to obstruct the officers from carrying out their duties, but had been a purely reflex action resultant from being in a state of panic.

The appellant appealed on the basis that the Judge had not outlined the terms of the Misuse of Drugs Act 1971 sufficiently strictly when summing up to the jury. In particular the Assistant Recorder had been wrong to allow the case to go before the jury because there had been no prima facie evidence that the appellant knew why he was being detained, since he had not been told the reason for his detention, and further that he had failed to direct the jury as to what evidence there was that the appellant knew that the officer wished to search him because he reasonably believed the appellant was in possession of a controlled drug. It was also submitted that the Judge had been wrong to refer to the previous experiences of the appellant when directing the jury as to evidence which could have demonstrated his knowledge of the reasons for his detention, and finally, that the Judge did not put to the jury the defence submission that there was clear evidence of the appellant's lack of intent to obstruct, in that his actions had been consistent with his alleged state of panic.

Held: The Assistant Recorder's summing up to the jury had been impeccable and clear in every

respect and the appeal would therefore be dismissed. He would have been quite wrong to withdraw the charge from the jury, since there was more than ample evidence to go to the jury from the circumstances and facts of the case as related. Obviously if a person is told in terms the reason for his detention under s. 23(2)(a) of the Misuse of Drugs Act 1971, it puts the question of his knowledge beyond doubt; but this was a situation where the obstructing act was done before the officer had an opportunity to explain what he was doing and why, and in such circumstances if the jury are satisfied that the reasons for detention are obvious, and must have been so to the detainee, then the requirement as to knowledge is satisfied. On the construction of s. 23(4)(a) of the same Act, a person commits an offence if he does any act which obstructs a constable who is lawfully detaining him or trying to detain him for the purpose of searching him for illicit drugs. In deciding the question of the defendant's knowledge or lack of it as to why he is being detained, all the circumstances of the situation must be considered.

Appeal: by James Thomas Forde against his conviction at Southwark Crown Court on May 31, 1984.

R. v. Forde C.A. 458

EDUCATION

School attendance — "walking distance" and "nearest available route" — whether route which is unsafe for children is "available" — Education Act, 1944, s. 39.

The appellants were convicted of failing to ensure their 12 year old daughter's attendance at school. The shortest route from their home to her school was 2.94 miles, but this route included a section of isolated and partly unmade track, which was totally unlighted. An alternative route, using metalled roads, was 3.2 miles long. The appellants' defence was that the school was not within "walking distance" (defined by s. 39(5) of the Education Act 1944 as "three miles measured by the nearest available route" in the case of children aged eight and over) and therefore they were entitled to an acquittal by virtue of s. 39(2)(c) of the 1944 Act, because the distance between home and school exceeded the statutory walking distance and the local education authority had not made suitable arrangements for transporting their daughter to school.

The local education authority, relying on *Shaxted v. Ward* (1954) 118 J.P. 168; [1954] 1 All E.R. 336, refused to provide free transport because a route of less than three miles was "available".

The magistrates' court convicted the appellants and conditionally discharged them. The Crown Court dismissed appeals against conviction, but substituted absolute discharges. On appeal to the Divisional Court.

Held: (allowing the appeals) (i) a route which a responsible parent would not allow his child to use could not be said to be an "available route"; therefore (ii) the appellants were entitled to the defence afforded by s. 39(2)(c) of the 1944 Act, and the case would be remitted to the Crown Court with a direction to acquit.

(*Shaxted v. Ward* distinguished.)

Appeal from a decision of the Crown Court sitting at Chelmsford, dismissing appeals against conviction from the justices for the county of Essex, in the Petty Sessional Division of Colchester.

Rogers and Rogers v. Essex County Council Q.B.D. 651

FIREARMS

Firearms Act 1968 — "imitation firearm" — not necessary to be capable of discharging a missile — appearance of firearm at relevant time is sufficient.
Conspiracy — matter for jury whether acts could have another explanation or not.

The appellants and another man, Scarborough, were tried for robbery of a jeweller's shop. The appellants were convicted at the Central Criminal Court of having an imitation firearm with intent, at the time of the robbery. An employee of the jeweller stated that King had been holding a stick similar to a pickaxe and another of the robbers had held what appeared to be a double-barrelled shotgun with dents on the end of the barrel and the butt end covered with material. Two metal pipes bound together with red tape were found in Morris's car a week after the offence when Morris and Scarborough were present.

The question raised in the appeal is: whether the two metal pipes bound together with tape and carried by one of the robbers under his clothing or similar material so as to look like the barrel of a shotgun, constituted an imitation firearm.

After the robbery the police saw King's car, the other two defendants in it, near his home. They were arrested and balaclavas and other items were found in the car which were identified by the jeweller's employee. It was left to the jury to decide if this was evidence of a conspiracy to rob.

Held: 1. Section 18(1) of the Firearms Act 1968 makes it an offence for a person to have a firearm with him with intent to commit an indictable offence. Section 57 of the Act defines "imitation firearm" as "...any thing which has the appearance of being a firearm... whether or not it is capable of discharging any shot, bullet or other missile", a firearm being "...a lethal barrelled weapon of any description... any component parts of such a... weapon".

Section 18 is not a "use" section and the state of mind of the accused is a separate element of the offence as is the intention of the manufacturer. The issue is whether the thing looked like a firearm at the time the accused had it with him: that is a matter for the jury to consider having seen the thing and heard the evidence of witnesses, where available. The subsection stated that the offence is committed if the accused had the necessary intent while he had the firearm or imitation firearm with him. There was accordingly no error in the Judge's summing up on this question.

2. On the conspiracy count, it is essentially a matter for the jury whether the matters to which reference had been made were overt acts of conspiracy or susceptible of some other explanation. The Judge's summing up dealt with the points fairly and there was therefore no substance in the ground of appeal.

R. v. Morris and King C.A (Crim. Div.) 60

FOOD AND DRUGS

Food and Drugs — sample of food taken for analysis — time limit for bringing prosecutions — extension of time by certificate by a justice of the peace that it was not practicable to lay information within a specified time — s. 108 of the Food and Drugs Act 1955.

On December 7, 1983 it was alleged that the applicants sold a mixture of minced beef and heart contrary to the Food Labelling Regulations 1980. Samples of the meat were taken in accordance with the procedure laid down in s. 108 of the Food and Drugs Act 1955, which requires an information to be laid in such circumstances within two months of the procuring of the sample, unless a magistrate certifies that in the circumstances it was not "practicable" to do so. The

sample was sent to the analyst and his certificate was not received by the trading standards officer until January 17, 1984. The latter did not arrange to interview the appropriate officer of the applicants until February 6, the date by when in normal circumstances the information should have been laid. The trading standards officer did not hand his report over to his senior officer until February 9. On receipt of the report the latter approached a justice of the peace requesting a certificate to the effect that earlier laying of the information was not practicable. This was granted by the justice, and the applicants applied to the Divisional Court for the quashing of the certificate.

Held: Whilst it is quite proper for trading standards officers to take great care in considering if and whom to prosecute, the meaning to be given to the word "practicable" must be strict. It was clearly feasible for an information to have been laid on or before the expiry of the two month period; consequently the granting of the certificate would be quashed.

Application by the applicants against a decision of Muriel Alice Harvey, a Justice for the County of Shropshire.

Food and Drugs Act 1955 s. 6 — alleged false description on label — orange juice described as 'natural' — meaning of 'natural' — what ordinary man would understand by word.

The respondent company was charged under s. 113 of the Food and Drugs Act 1955 as being the person whose act or default gave rise to an offence under s. 6 of that Act, namely the giving in a label attached to or printed on a wrapper or container of a false description, namely 'natural' orange juice. The orange juice in question was extracted from oranges produced in a number of countries abroad, pasteurized and packed in a condensed form for shipping to this country. On arrival here it was further processed by adding water and it was pasteurized for a second time. No additives were added at any stage. The prosecution alleged that it was an offence to describe the juice as 'natural'. The justices dismissed the information. On appeal:

Held: In the absence of any strict definition whether in statute or previous case law the appropriate test to apply was to consider what the ordinary man would understand by the use of the word 'natural'. In the circumstances the decision of the justices that the drink was correctly described was one which was perfectly reasonable on the facts and the appeal would be dismissed.

Supply of medicines — forged prescription — contrary to Medicines (Prescription Only) Order 1980 and s. 58(2) of the Medicines Act 1968 — whether an offence of strict liability.

The respondents who were pharmacists, supplied a variety of medicines on the strength of two prescriptions. It was subsequently discovered that these prescriptions were forged, although the respondents were not aware of the forgeries at the time of the supply by them. The respondents argued before the magistrate that the offence was one involving a mens rea requirement. This argument was accepted and the prosecutor appealed to the Divisional Court. On appeal:

Held: Accepting that the offence was of a quasi-criminal nature and bearing in mind the public interest which requires a high standard of care in conduct, control and general supervision of a

pharmacist's business, the offence is one of strict liability (Dicta of Lords Reid and Diplock in *Sweet v. Parsley* (1969) 133 J.P. 188. [1970] A.C. 132 at pp. 189 and 163 respectively applied).

Appeal: by way of case stated from the decision of the Metropolitan Stipendiary Magistrate sitting at Wells Street magistrates' court.

Pharmaceutical Society of Great Britain v. Storkwain Ltd. Q.B.D. 625

Food not of nature, substance or quality demanded by purchaser — whether minced beef containing quantities of other meats not of the nature or substance — whether sale was to prejudice of purchaser — s. 2(1) Food and Drugs Act 1955.

In March 1984 a trading standards officer asked for a quantity each of minced beef and minced steak from the respondents' shop. He was sold meat taken from trays marked respectively, "minced beef" and "minced steak". On analysis, it was established that the minced beef contained no less than 10% by weight of pork and 10% of lamb. The minced steak was found to contain 10% by weight of pork. The respondents were charged under s. 2(1) of the Food and Drugs Act 1955 of selling the food to the prejudice of the purchaser, which was not of the nature demanded by the purchaser. The justices dismissed the informations, on the ground that they could not be sure that a reasonable purchaser would have been prejudiced. On appeal:-

Held: (1) It was likely that the deficiency alleged by the prosecutor came within both the "nature" and "substance" provisions in s. 2(1) and therefore an information alleging a deficiency in the "nature" of food demanded was not defective.

(2) There was no evidence before the justices to enable them to conclude other than that the ordinary reasonable purchaser would be prejudiced by receiving a product containing 80% of what was demanded.

Shearer v. Rowe Q.B.D. 698

GUARDIANSHIP OF MINORS

Guardianship of Minors — application for access by man claiming to be the father of an illegitimate child — interim order for access cannot be made until paternity is established — ss.9 and 14 Guardianship of Minors Act 1971 and s.2(4) Guardianship Act 1973.

A man claiming to be the father of an illegitimate child applied under the Guardianship of Minors Act for access to the child. The mother denied that he was the child's father, and the application was adjourned for the paternity issue to be determined. The Judge made an interim order for access, and the mother appealed.

Held: The only persons to whom access may be granted are the parents and grandparents. Until the court determined that the claimant was the father the court had no jurisdiction under the Guardianship legislation to make an access order in his favour.

By the court: If there had been an application for the child to be made a ward of court the Judge would have had such jurisdiction.

Appeal allowed.

Appeal to the Court of Appeal from the Family Division of the High Court against an interim order for access made under the Guardianship Acts.

Re O (a minor) 172

HIGHWAYS AND FOOTPATHS

Obstruction of highway — entertainment in pedestrian precinct — whether justices entitled to use local knowledge

The respondent, a busker, was juggling with lit firesticks in a pedestrian precinct which at that point was at least 40 feet wide. Members of the public were able to pass freely on the street although some deviated around the immediate area where he was performing and a few stopped briefly to watch him. The justices, using their local knowledge that street entertainment in pedestrian areas was well established and accepted, decided that the obstruction caused was not unreasonable having regard to all the circumstances of the case and dismissed the information alleging an offence under s. 137(1) of the Highways Act 1980. On appeal by the prosecutor by way of case stated.

Held: 1. Members of the public have the right to pass and re-pass along a highway. A person who stops on a highway prima facie causes an obstruction and unless the stopping can properly be regarded as ancilliary to or part and parcel of one's right to pass and re-pass on that highway, the obstruction becomes unreasonable and, in the absence of lawful authority, an offence under s. 137 of the Highways Act 1980 is committed. In the present case the action of the respondent could not be so regarded and, there being no lawful authority, the appeal would be allowed.

2. Where justices proposed to take judicial notice of local conditions they should disclose that fact and details of their proposal to the prosecution and defence and give each an opportunity to comment and/or call evidence thereon.

Appeal: by way of case stated by the Bath justices in respect of their dismissal of an information against Michael Taylor for an offence of wilful obstruction of the highway.

Waite v. Taylor Q.B.D. 551

HUSBAND AND WIFE

Husband and wife — assessment of amount of periodical payments order under s. 3 of the Domestic Proceedings and Magistrates' Courts Act 1978 — magistrates' court should make a separate assessment under each paragraph and weigh all those assessments in the final determination of the amount — and the statement of reasons which the magistrates prepare for use in an appeal should disclose that that has been done.

A wife who had deserted her husband applied for an order on the ground of his failure to provide reasonable maintenance for a child of the family (s. 1(b) of the Domestic Proceedings and Magistrates' Courts Act 1978). The magistrates' court refused to make an order for the wife's maintenance, holding that her conduct in deserting her husband was gross and obvious conduct relevant to financial provision. The High Court upheld that refusal, and the wife appealed to the Court of Appeal.

There it was argued and accepted that as the magistrates' reasons for their decision did not refer to any matter, other than conduct, which they were required by (the then) s. 3(1) to take into account, they had evidently failed to take those other matters into account.

Held: (1) The magistrates' court should not only have made separate findings upon each of the seven matters set out in s. 3(1) and then reached a just and reasonable decision by balancing those findings one against the other, but in the contemporaneous statement of reasons should have disclosed that they had done so.

(2) The magistrates' court should have taken account of the wife's need of maintenance so long as the need to look after a young child prevented her from seeking employment, and should have

made a periodical payments order in her favour.

(3) The order should be back-dated to the date when her own entitlement to state benefits, including unemployment benefit, ceased.

Appeal allowed, and periodical payments order made.

Appeal: by wife against dismissal of her appeal by the Family Division of the High Court from the refusal of a magistrates' court to make an order in her favour for periodical payments for her own maintenance.

Maintenance order — application for reduction of periodical payments — remission of arrears — appeal by notice of motion to the High Court not available in respect of remission.

On the husband's application for the reduction of the amounts payable under a magistrates' court maintenance order the magistrates reduced the amounts payable and remitted some of the arrears. He was dissatisfied with the extent to which they had varied the order and with the extent to which they had remitted arrears. In respect of the former matter he exercised his right of appeal to the High Court under s.29(1) of the Domestic Proceedings and Magistrates' Courts Act 1978, and he sought to appeal in the same way in respect of the second matter.

The evidence had disclosed no special circumstances suggesting a margin between the level of subsistence and the amount of supplementary benefit.

Held: (1) The power to remit arrears is in s.95 of the Magistrates' Courts Act 1980. It may be exercised upon an application for a variation of amount but that does not make it an application under s.20 of the Domestic Proceedings and Magistrates' Courts Act 1978 which authorizes the variation of amount. Hence the proceedings for remission are not proceedings under Part I of the 1978 Act and do not qualify for appeal by notice of motion to the High Court under s.29(1) of that Act. There remains an appeal by case stated under s.111 of the Magistrates' Courts Act upon a point of law or jurisdiction. *Mills* v. *Mills* [1982] Fam. Law 174, FD, followed *Allen* v. *Allen* [1985] 2 W.L.R. 64 (a registered order to which s.4(7) of the Maintenance Orders Act 1958 applied) doubted.

(2) The order should have been reduced to a purely nominal amount. *Williams* v. *Williams* [1974] 3 All E.R. 377, FD, followed.

Appeal by notice of motion to the High Court in respect of a magistrates' court decision varying an order and remitting arrears.

JURIES

Composition of juries — member of jury with personal reasons for bias — whether this renders verdict of jury unsafe or unsatisfactory.

The appellant appeared before the Crown Court at Bolton and was convicted on one count of causing criminal damage, and sentenced to three months' imprisonment. Significantly his two co-accused in the dock had been acquitted.

The facts established that the appellant and his co-accused had been pickets at Golbourne Colliery in Lancashire during the miners' strike. A working miner had been forced to stop his car at the gates and it had been surrounded by pickets banging on it and shouting abuse. Then, apparently at the instigation of the appellant, he and a group of pickets (including the two co-accused) turned the car over. There was no evidence that the co-accused had used any words such as those used by the appellant to initiate the incident which caused damage to the working miner's car.

What was unknown until after the trial was the jury at Bolton Crown Court had comprised one member who was employed by the National Coal Board and who was working at the time of the trial. The appellant submitted that as a result of that fact there was a real risk of prejudice to him, in that the working miner may not have adhered to his oath. The appellant himself appeared regularly on stage, screen and television in the area of the strike and contributed to various newspapers and he cited those facts to counter any argument which might be based on the acquittal of the two co-accused.

The submission was also based on what could have been done had this information about the juror been known before the jury was sworn, in particular: the possibility of a challenge for cause, or the possibility that the juror might have withdrawn in a situation (which is the current practice in some courts) where the trial Judge addressed members of the jury prior to commencement of the trial asking them to withdraw if they had an interest in the strike which would cause them difficulty in adhering to their oath. The appellant also appealed against his sentence.

Held: The arguments put forward in this appeal could not be maintained to attack this conviction. It was no ground for disqualification of a juror that he might have personal reasons for some bias towards the prosecution or the defence. Even if it were a ground for disqualification, that in itself would be no reason for setting aside the verdict of a jury, provided that the juror's name was on the jury panel. This was particularly true if there was merely a suspicion of bias as in this case. Furthermore the argument that a defendant's right to challenge for cause, which was not exercised through no fault of his own, would itself mean that the subsequent verdict was unsafe or unsatisfactory was untenable since it would result in a nonsensical situation where every defendant who failed inadvertently to challenge for cause could have the verdict set aside as unsafe and unsatisfactory. In the event the suspicion of bias was exploded here by the verdicts of the jury in respect of the other two defendants, despite what was said about the local knowledge about this appellant. The appeal against sentence would also be dismissed since the sentence passed was, in the view of the Court of Appeal, absolutely right and reflected correctly both the gravity of the offence and the appellant's own intelligence and good qualities.

Appeal: by Dennis Michael Pennington against his conviction and sentence at Bolton Crown Court on February 19, 1985.

R. v. Pennington C.A. 615

Jury — in previous case counsel for prosecution appeared in his capacity as Assistant Recorder — influence on jury — rules for barristers and court officials.

The appellant was convicted at York Crown Court, on September 11, 1983, of driving whilst disqualified. Counsel for the prosecution in the case had a week previously presided as Assistant Recorder at York Crown Court and on that occasion he had, through his clerk, reminded court officials that he was due to appear at the court in the following week. Unfortunately, due to an error by court staff, steps were not taken to ensure that the composition of the jury was different on these occasions. In the event, at the appellant's trial ten of the jurors had been members of the jury in the previous week with that Assistant Recorder. The prosecution, on appeal, conceded that this should not have happened, but stated that the issues involved in the appellant's case were simple, and there was no material irregularity.

Held: Where the majority of a jury have been directed by counsel in a case, on a previous occasion when that counsel was sitting as a Judge, they may be inclined to accept his submissions in his capacity as counsel for the prosecution.

The *Code of Conduct for the Bar of England and Wales* states, in para. 59, that "a barrister may not accept a brief or instructions in any case where by reason of his connexion with the court... the impartial administration of justice might appear to be prejudiced". Annex 8 to the Code, in giving

examples of the application of the rule, states "[a barrister] should not appear in any court (a) before a jury which includes persons who were members of a jury panel serving at that court when he sat there as a Recorder...". So far as the steps which court officials should take to avoid such a situation are concerned, there is no reference to the subject in the *Crown Court Manual* and there has been no guidance since a circular in 1974.

In the present case, no steps having been taken to avoid the situation, there was a material irregularity at the trial, and it was not appropriate for the proviso to be applied since there was no certainty that the jury were not influenced by the circumstances of having previously seen counsel for the prosecution in his capacity as Judge.

Appeal: by Samuel Alfred Hoyland-Thornton, against conviction at York Crown Court, where counsel for the prosecution had previously presided as Assistant Recorder before a majority of the jury.

R. v. Hoyland-Thornton C.A. 315

JUSTICES' CLERKS

Crown Court — appeal against summary conviction — whether appellant entitled to require justices' clerk on subpoena to produce notes of evidence taken at summary trial.

The appellant John Mark Hill was convicted of two motoring offences by Lancaster justices and gave notice of appeal against that conviction. The central factual issue was whether he was the driver of the car at the time. Following the refusal of the justices' clerk to supply the appellant's solicitor with a copy of the notes of evidence taken at the summary hearing the Divisional Court, on application for judicial review, decided that it had no power to order him to do so. (*R. v. The Clerk to the Lancaster Justices, ex parte Hill* (1984) 148 J.P. 65). Thereupon the appellant's solicitor took out a subpoena summoning the clerk to produce his notes to the Crown Court at the hearing of the appeal, but on the application of the justices' clerk the Crown Court Judge set aside the subpoena in the light of that Divisional Court decision.

At the hearing of the appeal in the Crown Court counsel for the appellant wished to challenge the veracity of two police prosecution witnesses and asked for leave to issue a fresh subpoena upon the clerk to produce his notes and testify if necessary, but the Judge said he had already given his decision on the subpoena and refused the application. The appeal proceeded and was dismissed. On appeal to the Divisional Court by way of case stated.

Held: 1. The procedure adopted in relation to the setting aside of the subpoena on the application of the justices' clerk was clearly in breach of r.23 of the Crown Court Rules 1982.

2. Had the appellant been legally aided in respect of the appeal to the Crown Court, the justices' clerk would have been required under reg. 16 of the Legal Aid in Criminal Proceedings (General) Regulations 1968 to supply to the appellant's solicitor, on request, a copy of the notes of evidence taken at the summary trial, and it was inconceivable that the same did not apply for the benefit of an appellant who was privately represented. The decision in *R. v. The Clerk to the Lancaster Justices, ex parte Hill (supra)* was doubted.

3. In the circumstances of the present case the appellant had been denied a right to which he was entitled, the appeal would be allowed and the conviction quashed.

Appeal: by way of case stated by Lancaster Crown Court in respect of the dismissal of an appeal by John Mark Hill against his conviction by the Lancaster justices of two offences under the Road Traffic Act 1972.

Hill v. Wilson Q.B.D. 252

Justices' clerk — whether advice to justices must be given in open court.

The applicant was charged with failing to provide a specimen of breath contrary to s. 8(7) of the Road Traffic Act 1972 as amended, and in the course of the trial defence counsel made submissions based on a passage in *Wilkinson's Road Traffic Offences*. After the justices had retired, their clerk, remaining in court, read the pasage and concluding that counsel's submissions were wrong in law she indicated in open court that she proposed to advise the justices of her view of the law. When defence counsel suggested that she should not leave the court unless and until the justices requested advice, she replied that it was her duty to advise them on the law. She then left the court and later returned in advance of the justices who convicted the applicant. On application for judicial review:

Held: It was not necessary that advice on law should be given to the justices by their clerk in open court. Justices were entitled, if they thought it right in the circumstances of any case, to receive that advice in the privacy of their retiring room provided there was no suggestion that the clerk had taken part in any decision of fact or the ultimate decision of the guilt or innocence of the accused.

Application: for judicial review of a decision of the Uxbridge magistrates' court in respect of the conviction of the applicant Miss Gina Janice Smith of failing to provide a specimen of breath.

R. v. Uxbridge Magistrates' Court, ex parte Smith Q.B.D. 620

LEGAL AID iii

Legal aid — joint defendants — whether court assigning a single solicitor to represent two or more legally assisted persons may assign counsel to be instructed by that solicitor in the Crown Court — Legal Aid in Criminal Proceedings (General) Regulations 1968, reg. 14.

The two defendants were committed for trial by the Camberwell Green magistrates' court jointly charged with affray and each was granted a legal aid order for the proceedings in the Crown Court authorizing representation by "solicitor and counsel jointly with" the other defendant. The solicitor assigned to both defendants instructed counsel who advised that they should be represented by separate counsel and accordingly another counsel was instructed for the second defendant. On the legal aid taxation at the conclusion of the trial in the Crown Court, the fees of the counsel originally instructed were allowed but those of the second counsel disallowed, and that decision was confirmed on reference to the Taxing Master on the ground that the legal aid order for the second defendant did not authorize separate counsel to be instructed. On appeal to the High Court:

Held: On a true construction of reg. 14 of the Legal Aid in Criminal Proceedings (General) Regulations 1968 a court assigning a solicitor to act for two or more legally assisted persons whose cases were heard together did not have power to assign the counsel to be instructed by that solicitor to appeal in the Crown Court and could not fetter the right of the solicitor to select counsel under reg. 9 of those Regulations. In the present case the words "jointly with" in the legal aid orders would be construed as explaining that the court had exercised its powers under reg. 14 to restrict the defendant's right to select a solicitor under reg. 8 and not as purporting to assign any counsel, and the appeal would be allowed with costs.

Appeal: against the refusal of the Taxing Master to allow the fees of counsel instructed to act for one of two legally aided defendants whose cases were heard together in the Crown Court on the

ground that the legal aid order did not authorize separate counsel to be instructed for the two defendants.

LICENSING

Licensing — application for justices' licence refused by licensing committee — fresh application made two months later — justices stipulated change of circumstances must be shown or new application would not be considered —analogy with refusal of bail inappropriate — Licensing Act 1964, ss. 3-6.

An application was made on behalf of Davys of London Wine Merchants Ltd. to the City of London Licensing Committee for an on licence in respect of premises at Crutched Friars in the City. The hearing was on March 1, 1985, and after hearing the application and objections to it, the committee refused to grant it. The applicant entered notice of appeal but that was later withdrawn. Instead a fresh application was made to the licensing committee which was set down for hearing on May 2, 1985. The justices indicated that the applicant would have to show a change in circumstances before they would entertain the application. Although the solicitor for the applicant argued that there were seven differences amounting to a change of circumstances, objectors commented that the application had been determined previously and that to hear the matter would open the door to repeated applications. The licensing committee declined to hear the fresh application and drew an analogy to a court not being required to hear repeated applications for bail unless there was a change of circumstances where bail had been withheld after a full hearing. The applicant applied for judicial review.

Held: The justices were wrong in law to refuse to consider the application. Neither the Licensing Act 1964 nor any other statute positively prevented the consideration of any fresh application even if the circumstances had not changed, and ss. 3 to 6 of the 1964 Act imposed no restrictions.

Per Curiam: The analogy with bail applications could be misleading and was unhelpful in this case. Nor was the new application made oppressively or flippantly so as to identify it as an abuse of process.

Appeal: By way of an application for judicial review by Davys of London Wine Merchants Ltd. for an order of mandamus requiring the City of London Licensing Committee to hear an application for an on licence on its merits.

Licensing — application for special orders of exemption in respect of football matches to be played on Saturdays at a League ground — no objection from police — opportunity for applicant to give evidence and make submissions on matters of concern to the justices which had come to their notice during the course of their magisterial duties — s. 74(4) Licensing Act 1964.

The applicant was licensee of the Doncaster Rovers Football Club ground. He applied to the Doncaster justices for special orders of exemption to cover the half time and immediate post

match period when the club was playing home league matches Similar applications were granted in 1982 and 1983. When applications were made in August 1984 they were adjourned for a week so that the justices could consider the exercise of their discretion, in the light of various factors that were of concern to them, including the possibility of violence resulting from the availability of alcohol. There was no objection from the police to the application. At the adjourned hearing the applicant was afforded the opportunity of addressing the Bench on the matters that were concerning them. The applications were refused. The applicant appealed by way of judicial review alleging that the justices had not given individual consideration to the merits of the case, that they had taken account of extraneous considerations (such as policing costs), and that they had failed to have proper regard to the absence of any disorder during the previous two seasons, for which exemptions were allowed.

Held: The application before the justices was clearly a strong one, the more so because of the police attitude. However the justices could not be regarded as having exceeded their jurisdiction or as having improperly exercised their discretion. The justices could not be accused of having introduced a new policy and applied it without having regard to the individual circumstances and it could not be said that they had totally ignored the evidence before them. The application would therefore be refused.

Appeal: by application for judicial review to quash a decision by the Doncaster justices in refusing to grant special orders of exemption to the applicant on August 16, 1984.

R. v. Doncaster Justices, ex parte Langfield Q.B.D. 26

Licensing — "sex establishment" — requirement for premises to be licensed by local authority pursuant to resolution — allegations of "knowingly" using etc., premises without licence — whether knowledge required was both of the absence of licence as well as the status of the premises as sex establishment — Local Government (Miscellaneous Provisions) Act 1982, s. 2 and sch. 3, paras. 6(1) and 20(1).

The appellant council passed a resolution under s. 2 Local Government (Miscellaneous Provisions) Act 1982, applying the provisions of sch. 3 of the Act, which related to the control of sex establishments, to the whole of its area. The resolution became effective on February 1, 1983, from which date such premises had to be licensed by the council. The first respondents were summoned on an information laid on behalf of the council that on two separate occasions "they did knowingly permit the use of premises at 4, Peter Street, W.1. as a sex establishment without the grant of a licence by the Westminster City Council" under sch. 3 of the Act, paras. 6(1) and 20(1)(a). The second respondent was summoned in respect of the same matters, the allegation being that they were "committed with his connivance, he being a director of Croyalgrange Ltd." contrary to sch. 3 of the Act — paras. 6(1), 20(1)(a) and 26(1).

On the hearing of the information, it was found by the Metropolitan Magistrate that the premises were being used as a sex establishment, that they were owned by Croyalgrange Ltd., and that Mr. Grech was a director of that company. The premises were, however, subject to a lease to a Mr. Buttigieg and it was possible that at the time there was a subtenancy to a Mr. Thomas. The Magistrate upheld defence submissions and dismissed the informations on the basis that he could not be satisfied that there was no licence in force. The council, contending that the submissions were not properly founded in law, appealed.

Held: Paragraph 20(1)(a) of sch. 3 of the Act should be given its ordinary and natural meaning. Prima facie, as a matter of ordinary construction, when the word "knowingly" was introduced in a penal provision, knowledge was required by the accused of each of the facts constituting the *actus reus* of the offence. In this case a defendant must have knowledge not only of the fact that the

premises in question were being used as a sex establishment, but also that they were unlicensed.

Appeal: by Case Stated from a decision by Ronald Bartle, Metropolitan Magistrate sitting at South Westminster.

LOCAL GOVERNMENT

Local Government Law — local government electors have no right to delivery of copies of minutes — Evidence Act 1851 and Local Government Act 1972.

The appellant, a local government elector, asked the respondent, the clerk to the Selsey parish council, to provide him with a copy of the minutes of a particular meeting of the council. This request was refused, but it was made clear to the appellant that he could inspect the minutes and make copies himself, or he could arrange for someone else to do so on his behalf. The appellant then prosecuted the respondent under s. 228(7)(b) of the Local Government Act 1972 for refusing to supply a copy of the minutes. The magistrates convicted the respondent on the grounds that the appellant was a person entitled to be given copies or extracts of the minutes which were documents within the ambit of s. 228, and that the respondent's refusal to provide a copy must therefore amount to an offence. On appeal to the Crown Court, the respondent's conviction was quashed. On further appeal to the Divisional Court, where for the first time the appellant introduced an argument based on s. 14 of the Evidence Act 1851:

Held: (dismissing the appeal) (i) s. 228 made a clear distinction between the right of a local government elector to examine and to take extracts or copies of minute and orders for payment on the one hand, and the position of a person who is entitled, on payment of a reasonable sum, to receive copies of certain documents, on the other hand; therefore (ii) failure to provide copies of minutes was not an offence; and (iii) s. 14 of the Evidence Act 1851 had no relevance to a prosecution brought under s. 228 of the 1972 Act.

(*Semble:* the fact Parliament failed to repeal s. 228(7)(b) when it repealed (and re-enacted elsewhere) s. 228(4), must have been an oversight, since s. 228(7)(b) had no application to circumstances other than those covered by s. 228(4).).

Appeal from a decision of the Crown Court sitting at Chichester, allowing an appeal against conviction in the Chichester magistrates' court.

MAGISTRATES

Bail — relevant considerations when imposing conditions of bail — whether justices may use their own knowledge of local events — observations on appearance of "group justice" and advance preparations of bail forms with anticipated conditions.

Nine coal miners on strike during a trade dispute appeared before the Mansfield justices in separate groups with other defendants charged, *inter alia*, with an offence under s. 5 of the Public Order Act 1936 and were remanded on bail, in each case subject to a condition in the following form: "Not to visit any premises or place for the purpose of picketing or demonstrating in connexion with the current trade dispute between the National Union of Mineworkers and the National Coal Board other than peacefully to picket or demonstrate at his usual place of employment".

The background to the cases was that a bitter trade dispute had been raging over several months in the East Midlands area in the course of which large numbers of striking miners had descended on working collieries in a violent and intimidatory manner in order to prevent by one means or another men employed there from going to work.

In each case the police had asked for the bail condition to be imposed because of the likelihood of the defendant committing further offences if released on unconditional bail, but called no evidence to substantiate their claim. The defending solicitors objected, submitting that proper consideration should be given to the individual circumstances in each case before the bail condition was imposed. In some cases the defending solicitors complained that the court clerk continued to prepare the bail forms on the basis that bail would be granted subject to the standard condition even while applications were being made for unconditional bail. The justices, being of opinion that each defendant was "likely to commit" or "may commit" further offences if granted unconditional bail, imposed the condition stated above. On application for judicial review.

Held: 1. In considering whether or not to impose a condition of bail in the circumstances of the present case, justices should ask themselves the simple question: "Is this condition necessary for the prevention of the commission of an offence by the defendant when on bail?" They were not obliged to have substantial grounds as they were when dealing with the refusal of bail under para. 2 of sch. 1 to the Bail Act 1976. It was enough if they perceived a real and not a fanciful risk of an offence being committed. They were concerned with s. 3(6) and para. 8(1) of that Schedule which, in spite of indifferent drafting, relected the intention of the legislature to impose less rigorous requirements when a defendant was being admitted to bail than when an unconvicted man was being refused bail altogether, and so gave the court a wide discretion to inquire whether the condition was necessary.

2. As was conceded, there was no requirement for formal evidence to be given; it was sufficient for the facts to be related to the justices at secondhand by a police officer.

3. The justices were entitled to use their knowledge of the events at local collieries during the preceding weeks, because it was only on the basis of that knowledge (*inter alia*) that they could properly reach a conclusion as to necessity of imposing a condition. In the circumstances which prevailed it must have been obvious to the justices that the defendants would, if released unconditionally on bail, have resumed their picketing activities in the East Midlands coalfields at the first opportunity, that any suggestion of peaceful picketing was a colourful pretence, and that it was a question of picketing by intimidation and threat which was unlawful. In all the cases before the court, save one, the justices could not be criticized in the exercise of their discretion, and in the excepted case there was no doubt that had the justices applied all relevant considerations they would have imposed a similar condition of bail. Accordingly all the applications would be dismissed.

4. The Court would however make the following observations on the procedure adopted: Putting into the dock together defendants who have been arrested on different occasions or at different places made it difficult to avoid the appearance of "group justice". The Court appreciated that the justices faced the uphill task of dealing with literally hundreds of cases over and above their normal list, and sympathized with them in their task. However, whatever pressures a court was subject to, the practice was one to be discouraged. Nor did it do the Bench credit if their clerk continued to affix standard conditions to bail forms even while applictions were being made for unconditional bail, as happened in some of the instant cases. But the fact that the outcome of the application was correctly anticipated did not vitiate the decision.

Application: for judicial review by way of certiorari and mandamus directed to the Mansfield justices in relation to their decisions to grant bail subject to a standard condition to each of the nine defendants charged with offences arising out of a trade dispute.

R. v. Mansfield Justices, ex parte Sharkey and Others Q.B.D. 129

Binding over — refusal of defendant aged 19 years to enter into recognizance to keep the peace — whether justices have power to commit him to custody.

Following a disturbance arising out of a neighbourhood dispute the justices ordered the appellant then aged 19 years, on complaint, to be bound over in the sum of £200 for two years to keep the peace under s. 115(1) of the Magistrates' Courts Act 1980. The appellant twice refused to enter into a recognizance and the justices committed him to custody for one month unless he sooner complied with the order, taking the view that his refusal was "a kindred offence" to contempt of court within the meaning of s. 9(1)(c) of the Criminal Justice Act 1982. On appeal by way of case stated:

Held: Section 9(1)(c) of the Criminal Justice Act 1982 empowered a court, subject to s. 1(5), to commit a person under 21 but not less than 17 years of age to be detained for "contempt of court or any kindred offence". It was clear that a failure to obey an order to enter into a recognizance to keep the peace could not be dealt with by the justices as a contempt of court under s. 12(1) of the Contempt of Court Act 1981. However, a refusal, twice repeated in open court, to enter into such a recognizance was "a kindred offence" to the matters within the ambit of s. 12(1) and the decision of the justices was correct.

Appeal: by way of case stated by the St. Helen's justices in respect of their order that the appellant George Robert Gilbert Howley, aged 19 years, be committed into custody for one month unless he sooner complied with their order to be bound over to keep the peace.

Howley v. Oxford Q.B.D. 363

Breach of natural justice — hearing against unrepresented deaf defendant in absence of interpreter — relevance of defendant having pleaded guilty.

The applicant was charged with driving a motor vehicle with excess alcohol in his breath and indicated in writing his intention to plead guilty. At the original hearing the justices adjourned the case for an interpreter because it was apparent that the applicant was totally deaf and had difficulty in communicating orally or in writing. At the adjourned hearing when the case was called at the end of the court list, the interpreter was not present, he having telephoned to say his car had broken down. The justices, being concerned that the applicant should not be put to the trouble of having to attend court again, decided to proceed. The applicant pleaded guilty and was convicted. On application for judicial review to set aside the conviction it was submitted that it was contrary to natural justice that a hearing of a criminal charge should take place when the defendant who was deaf did not have the assistance of an interpreter and was not legally represented.

Held: Although the court wholly sympathized with the predicament of the applicant whose powers of comprehension of the court proceedings were limited, as he had made it abundantly plain that he was pleading guilty to the offence and had made no complaint whatsoever of the punishment inflicted — that it was in any sense unlawful or unfair — it was impossible for the court to say that its discretion should be exercised to set aside the conviction.

Per Watkins, L.J.: Whilst acknowledging that the justices with the best of motives acted as they did, I feel bound to say that justices who go on with the hearing of a charge against a defendant who is handicapped, as this one was and is, take a very considerable risk of the hearing which they conduct being described as contrary to natural justice. There should not, in my judgment, be an occasion when a man so handicapped should be without assistance either from an interpreter or legal representation, or if need be both.

Application: for judicial review to set aside a conviction of Stephen James Davey by the Kingston-Upon-Thames justices on the ground that the proceedings were contrary to natural justice.

Charge of robbery — defendant aged 16 at first appearance — case adjourned — defendant attains age of 17 — application of s. 24 Magistrates' Courts Act 1980.

The defendant, aged 16, appeared in the juvenile court on March 22, 1984 to answer a charge of robbery. The charge was not put, no plea was entered and the decision of the court was merely to adjourn the case to April 26, 1984. By the time of the adjourned hearing the defendant was aged 17. The justices decided that the defendant had not appeared or been brought before the magistrates' court on an information charging him with an indictable offence before April 26, 1984 when the charge was initially put to him and therefore s. 24 of the Magistrates' Courts Act 1980 did not apply.

Held: The material date for determining the mode of trial was the date when the defendant appeared before the justices when the charge was put and the proceedings were ready to be commenced. At that date the defendant was aged 17 and the justices had no discretion to allow summary trial. Appeal dismissed.

Application: for judicial review and an order of certiorari to quash the decision of the juvenile court whereby they refused his request to be tried before the juvenile court on a charge of robbery.

Common assault — complaint by or on behalf of person aggrieved — whether carries right of trial by jury — Offences Against the Person Act 1861, ss. 42 and 46 — review of procedural provisions governing assaults.

The applicant was charged before a magistrates' court with common assault contrary to s. 42 of the Offences Against the Person Act 1861 and sought the right of trial by jury. The justices being of the opinion that the offence did not carry a right of trial on indictment refused the application and adjourned the case pending an application for judicial review.

The Divisional Court reviewed the historical development of the law in relation to assaults and

Held:

1. A common assault in respect of which a complaint was made under s. 42 of the Offences Against the Person Act 1861 by or on behalf of the person aggrieved (as in the present case) was triable summarily at the discretion of the justices. If the justices decided to accept jurisdiction then the accused had no right to elect trial by jury. The justices had power, however, under s. 46 of that Act to refuse summary trial and in that event the offence became triable on indictment only.
2. Section 42 of the 1861 Act, re-enacting previous legislation with limited amendments, was a procedural section and did not create any new or separate offence. It was wrong therefore to charge a person with "assault contrary to s. 42 of the Offences Against the Person Act 1861" as the present applicant was charged.

3. Section 43 of the Act of 1861 created a separate offence of "aggravated assault" on females or on boys under 14 years of age, and gave the justices greater powers of punishment than they had on summary conviction for assault under s. 42, whether the complaint was by the party aggrieved or otherwise.
4. The statutory offences of assault occasioning actual bodily harm and common assault created by s. 47 of the Offences Against the Person Act 1861 were triable either way by virtue of s. 17 and sch. 1, Magistrates' Courts Act 1980.
5. If, apart from the above, there remained an offence of common assault chargeable under the common law alone, it was triable only on indictment.

Application: for judicial review of a decision of the Harrow justices whereby they denied the right of trial on indictment to Mrs. Carol Gracelyn Osaseri on a charge of common assault under s. 42 of the Offences Against the Person Act 1861.

Application dismissed.

Compensation orders — proving loss — whether evidence necessary or representations sufficient — duty of prosecution to adduce evidence — Powers of Criminal Courts Act 1973, s. 35(1A).

The applicant and his co-defendant pleaded guilty before a magistrates' court to two charges of theft and asked for five other offences to be taken into consideration. The total value of the property jointly stolen was £838 and the prosecution applied for £328 compensation in respect of unrecovered property. Liability for the loss was disputed by the defence and the prosecutor was unable to call any evidence to substantiate his claim for compensation but he made representations that, in assessing the loss, allowances had clearly been made for the property recovered. The justices were referred by their clerk to the amended provisions of s. 35 of the Powers of Criminal Courts Act 1973 and in particular to the new subs. (1A) and advised that they were entitled to consider the representations even though evidence in the strict sense was not available. After retiring, the justices sentenced both defendants to community service and ordered the applicant to pay £164 compensation. On application for judicial review:

Held: The court had no jurisdiction to make a compensation order without receiving any evidence where real issues were raised as to whether the claimants had suffered any loss and, if so, the extent of that loss. Representations alone were not sufficient. Section 35(1A) of the 1973 Act seemed to contemplate that the court could make assessments and approximations where the evidence was scanty or incomplete and then make an order which was "appropriate". But where, as in the present case, issues of liability for loss were raised, justice required that the defendant should have a proper opportunity to test the grounds on which the compensation order was to be made against him and it was for the prosecution and not the defence to place evidence before the court. The application would be granted and the compensation order quashed.

Application: for judicial review to quash a compensation order made against the applicant Neil Donald Richards by the Horsham justices.

Community service order — application by offender to revoke order made by magistrates' court — whether justices have power to sentence for original offence — Powers of Criminal Courts Act 1973, s. 17(2).

The applicant, who was the subject of a community service order made by a magistrates' court on each of two offences of obtaining social security benefits by deception, applied to that court under s. 17(2) of the Powers of Criminal Courts Act 1973 for the orders to be revoked on the ground that he had obtained full-time employment. The justices thereupon revoked the orders and sentenced him to a total of six weeks' imprisonment for the original offences. On his appeal against sentence to the Crown Court, the Judge decided that the justices had no jurisdiction to deal with the application under s. 17(2) as that sub-section was limited to cases where the application was under s. 17(1) of the Act to extend the period of a community service order. Accordingly he remitted the matter back to the justices. On application for judicial review:

Held: The restrictive words "on any such application" in s. 17(2) of the Powers of Criminal Courts Act 1973 referred back *only* to the words "on the application of the offender or the relevant officer" in s. 17(1), and did not extend to the nature of the application in the latter sub-section. In the present case, therefore, the justices had power to revoke the community service orders or to revoke them and deal with the applicant for the original offences in a different manner. Accordingly an order of mandamus would be granted directing the Chelmsford Crown Court to proceed with the hearing of the appeal.

Application: for judicial review of the decisions of Grays magistrates' court and Chelmsford Crown Court whereby on an application by the applicant George David Aldwinkle for the revocation of a community service order the justices sentenced him to six weeks' imprisonment and, on appeal, the Crown Court remitted the case back to them on the ground that they had no jurisdiction to deal with the matter.

R. v. Grays Magistrates' Court and Chelmsford Crown Court, ex parte Aldwinkle Q.B.D. 282

Community service order made by magistrates' court — limitation of sentencing powers of Crown Court on revocation — jurisdiction of Divisional Court to amend irregular sentence.

The applicant, David Benjamin Bradley, who was subject to two community service orders made by a magistrates' court on charges of burglary and attempted burglary, was convicted at Newcastle upon Tyne Crown Court of two offences of burglary and one of taking a motor vehicle without the owner's consent. On conviction the Recorder revoked the community service orders under s. 17(3) of the Powers of Criminal Courts Act 1973 as amended and sentenced the applicant to nine months' youth custody on each of the two orginal offences and ordered that a sentence of nine months' youth custody for the offences of which he had been convicted on indictment should run consecutively, making a total of 18 months' youth custody. On application for judicial review challenging the validity of the sentences in respect of the community service order offences.

Held: 1. Under s. 17(3) of the 1973 Act the powers of the Crown Court to deal with the offences in respect of which the community service orders were made by the magistrates' court were limited to those available to the justices who made the orders, i.e. a sentence of not more than six months' youth custody for each of the original offences or two consecutive sentences each of six months or less. Accordingly the Recorder had no power to impose a sentence of nine months' youth custody concurrently for each of the two offences in respect of which the community service orders were made.

2. As there was no right of appeal against that decision to the Court of Appeal under s. 10 of the Criminal Appeal Act 1968 as amended, the Divisional Court had power under s. 43(3) of the Supreme Court Act 1981 on an application for judicial review, to vary the order of the Crown Court which was made on, but did not form part of, the conviction of the offender. The sentences imposed by the Crown Court in relation to the community service orders were clearly irregular and would be amended to six months' youth custody for the burglary offence and three months' youth custody consecutively for the attempted burglary offence, making a total of nine months in all which was what the Recorder intended.

Per curiam: If in the future there are cases in which the Divisional Court's jurisdiction is being moved to quash or vary an irregular sentence under s. 43(3) of the Supreme Court Act 1981, the prosecution ought to be represented in order to bring before the Court all relevant material relating to the offences and the antecedent history of the accused which, together with mitigating factors produced by the applicant, would enable the Court to exercise its powers.

Application: for judicial review and an order of certiorari to quash an order of the Newcastle upon Tyne Crown Court that the applicant, David Benjamin Bradley, serve a sentence of nine months' youth custody for two offences in respect of which a magistrates' court had originally imposed a community service order.

Contempt of court – restriction on power of court to prohibit publication of name, etc. – Contempt of Court Act 1981, s.11.

On May 2, 1984, the Arundel magistrates' court directed under s.11 of the Contempt of Court Act 1981 that the name and address of a defendant charged with three offences should not be published in any way until further order of the court, and reduced that direction into writing in accordance with Practice Direction [1983] 1 All E.R. 64. At an adjourned hearing on May 23 when the direction was still in force the defendant pleaded guilty to the three charges and was sentenced to imprisonment.

On application being made for an order of certiorari to quash the direction governing both hearings, the Divisional Court found established as facts that the name and address of the defendant had been mentioned in open court on May 23 and that, on the basis of established practice, they must also have been mentioned in open court on May 2.

Held: On a proper construction of s.11 of the Contempt of Court Act 1981 a court had no power to prohibit the press from publishing the name and address of a defendant unless the court first allowed the name and address to be withheld from the public in the proceedings before the court. In the present case the name and address of the defendant had been used in court on both occasions and accordingly the direction would be quashed.

Application: for judicial review and an order of certiorari to quash two directions of the Arundel justices under s.11 of the Contempt of Court Act 1981 prohibiting the publication of the name and address of a defendant.

Defendant in prison on remand in custody — due to appear in court to which remanded on bail — duty of prison governor to produce him.

During the period August 8 to October 11, 1983, when the appellant John Walsh was continuously in custody under successive remand warrants from the South Western magistrates' court, he was also due to appear on a number of occasions at the Horseferry Road magistrates' court having there been remanded on bail on other charges. He was not produced from prison on five occasions when he was due to appear at those courts, details of which (taken from the

judgment of Webster, J. in the Divisional Court on October 27, 1983) may be summarized as follows:

Date due to appear: 1983	*At which magistrates' court*	*Reason for non-production*
Aug. 9	Horseferry Road	Only received in prison the previous day on remand in custody from South Western magistrates' court, and prison governor unaware of remand on bail to Horseferry Road court until too late.
Sept. 2	South Western	No application made to produce.
Sept. 9	Horseferry Road	Prison staff shortages.
Sept. 12	South Western	Administrative misunderstanding.
Sept. 16	Horseferry Road	Prison staff shortages.

At the hearing of the application before the Divisional Court for *habeas corpus ad respondendum* to bring up the appellant for trial, no complaint was made about the failure to produce him on August 9, September 2 and September 12 for the reasons stated above, but it was submitted that in failing to produce the appellant on September 9 and 16 the prison governor and the Home Secretary were in breach of duty.

The Divisional Court dismissed the application and on appeal to the House of Lords it was

Held: The Divisional Court had reached the correct conclusion. Neither the Secretary of State nor the governor of a prison who held in his custody prisoners remanded on bail by a magistrates' court under s. 128(1)(b) of the Magistrates' Courts Act 1980 was under an unconditional duty to produce them at court in accordance with the terms of their remand on duly notified dates. The duty of the Secretary of State, or of the governor acting under powers delegated to him, was to consider in accordance with s. 29 of the Criminal Justice Act 1961 whether he was satisfied that it was desirable in the interests of justice that such prisoners should be so produced and, if he was so satisfied, not unreasonably to refuse to produce them. In the present case the prison governor did not act unreasonably in failing to produce the appellant.

Appeal: from a decision of the Queen's Bench Divisional Court dismissing an application for a writ of *habeas corpus ad respondendum* directing the governor of Brixton prison and/or the Home Secretary to bring up the appellant for trial at the magistrates' courts to which he had been remanded on bail and for a declaration that the governor was under a duty to do so.

In Re Walsh H.L. 175

Double jeopardy — defective information not proceeded with — dismissal by justices before hearing evidence on substituted charge — whether plea of res judicata or autrefois acquit available.

The appellant was charged with an offence under s. 6(1) of the Road Traffic Act 1972 on an information erroneously alleging that the proportion of alcohol in his blood had been ascertained by a specimen of breath. He pleaded not guilty and at the adjourned hearing a second information was preferred alleging, as was the case, that the blood/alcohol level had been ascertained by a specimen of blood. When the defence counsel objected to the admissibility of the analyst's statement in view of its late service, the justices offered to adjourn the case, whereupon counsel agreed that the statement could be admitted but contended that the prosecution should be put to their election as to which information to proceed upon. When the prosecution chose to proceed upon the second information the justices immediately dismissed the first information, and upon the appellant pleading guilty to the offence in the second

information, they imposed a penalty. Upon appeal by way of case stated posing the question as to whether the second information should have been considered as *res judicata:*

Held: The doctrine of *res judicata* had no application as there had been no trial on the merits at any time. The justices were correct in allowing the prosecution to proceed at their election with the second information having decided not to proceed on the first, but it would have been preferable had the justices stayed their hand with regard to the first information until they had heard the evidence upon the second information and adjudicated upon it. In that event no question of *autrefois acquit* could possibly have arisen. The justices had taken a wrong procedural step in dismissing the first information at the time they did, but it had been more or less contemporaneous with the other step of beginning to hear the second information which the prosecution had elected to proceed upon. In those circumstances the appellant was not entitled to rely on the defence of *autrefois acquit* or *res judicata*, and the appeal would be dismissed.

Appeal: by way of case stated by the justices for the South Central Petty Sessional Division of Inner London in respect of their conviction of Christopher Broadbent of an offence under s. 6(1) of the Road Traffic Act 1972.

Broadbent v. High Q.B.D. 115

Election for summary trial — subsequent application to change election — relevance of defendant's state of mind when election made and of his subsequent belief, following legal advice, that he had a defence.

The applicants, who were unrepresented, appeared before the Birmingham justices charged with the theft of wood valued £12, elected summary trial and pleaded guilty. In mitigation each said he believed the wood had been thrown away, whereupon the court ordered pleas of not guilty to be entered and advised the applicants to seek legal advice. At an adjourned hearing their solicitor applied for leave to vacate the election and elect trial by jury on the grounds that the applicants lacked the necessary mens rea and were now legally represented. The application was refused with no reasons given, as was a similar application made a month later when it was submitted that the original election had been made by mistake. On application for judicial review:

Held:

1. On the authority of previous decisions of the Divisional Court the following principles emerged:
   (a) An accused was not lightly to be deprived of his right to be tried by jury if he so wished.
   (b) Regardless of the fact that the justices have said that they regard summary trial as the more appropriate, the accused had an absolute right to refuse to consent. If an accused demonstrated that his original choice was exercised when he did not properly understand the nature and significance of the choice he was making, then it was as if he had never made that choice.
   (c) A most important factor in the mind of an accused when deciding which court he would like to deal with the case was whether or not he believed he had any defence, and he might not know he had a defence until he had had legal advice.
2. Following the decision in *R. v. Highbury Corner Justices, ex parte Ali* (unreported: May 22, 1984) the broad justice of the situation in the present case demanded that the applicants be allowed to re-elect, and no other conclusion was reasonable. They had pleaded guilty under the misapprehension that they had no defence; they elected summary trial under the misapprehension that they would not be tried but merely sentenced; and it was only when they took legal advice that the reality of their situation became apparent for the first time. Even though at the time of election they might have understood the choice they were being

asked to make, they did not appreciate its significance.
Certiorari granted and case remitted for reconsideration by a fresh bench of justices.

Application: for judicial review of two decisions of the Birmingham justices each refusing to permit the applicants Henry Hodgson and Keith Barry Wiseman to withdraw their earlier election for summary trial, so that they might elect trial by jury.

R. v. Birmingham Justices, ex parte Hodgson and Wiseman Q.B.D. 193

Election for summary trial — young offender not understanding nature of election — subsequent application to re-elect following legal advice.

The applicant, aged 17 years, was arrested on Saturday evening January 21, 1984, charged with assault occasioning actual bodily harm and with malicious wounding and appeared before the magistrates' court on Monday January 23, 1984 when he was unrepresented. He elected summary trial and pleaded not guilty. At an adjourned hearing on February 17, having taken legal advice, he applied to change his election to enable him to be tried by a jury, submitting:
(i) that he had been unrepresented on the previous occasion;
(ii) that he was only 17 and had never been in a magistrates' court before;
(iii) that he did not understand the choice he was making; and
(iv) that the relatively serious nature of the charges made trial by jury appropriate.
In dismissing his application the stipendiary magistrate said "I am quite sure that this court can grapple with the difficulties in this case; application refused."
On application for judicial review to quash the earlier election for summary trial and the later refusal to allow re-election:

Held:
(a) on the matter of re-election:
1. Having regard to the applicant's age and the uncontradicted assertion that he did not understand the choice he was asked to make, the magistrate should have assumed that he had not made an informed choice on the first occasion. In the circumstances, the broad justice of the situation required that he be allowed to re-elect and that was the only reasonable conclusion.
2. The observation of the stipendiary magistrate that the court could grapple with the difficulties, indicated that he had misunderstood the very limited use to which his own view as to the more suitable mode of trial could properly be put. It therefore appeared that he had taken into account a factor which should not have weighed with him.

(b) on the matter of setting aside the original election for summary trial:
Although, in view of the applicant's age and the serious nature of the charges, it was clear that he would get legal aid and that his election would have been more informed had it been taken after he had obtained legal advice, the decision of the stipendiary magistrate to put him to his election on his first appearance before the court on January 23 did not offend the principles laid down in the *Wednesbury case* [1948] 1 K.B. 223. Certiorari granted under (a) above and case remitted for reconsideration by a fresh bench of justices. No order made on application under (b) above.

Application: for judicial review to quash the election of the applicant Leroy Alan Weekes for summary trial and to quash the refusal of the Highbury Corner magistrates' court to permit him to withdraw his election for summary trial and re-elect trial by jury.

R. v. Highbury Corner Magistrates, ex parte Weekes Q.B.D. 204

Enforcement of fine — issue of warrant of commitment postponed on conditions — whether justices may thereafter vary the conditions — duty of court to give defaulter notice of intention to issue warrant of commitment.

Following the appellant's default in the payment of four fines imposed on summary conviction the Colchester justices fixed terms of imprisonment totalling 60 days but postponed the issue of the warrant of commitment on condition that the fines were paid at £3 a week under s. 77(2) of the Magistrates' Courts Act 1980. Later in reply to a letter from the appellant saying that he could no longer afford to pay £3 weekly because of an increase in his rent, the clerk to the justices informed him that on the authority of *R. v. Clerkenwell Stipendiary Magistrate, ex parte Mays* (1975) 139 J.P. 151; [1975] 1 W.L.R. 52 the court had no power to vary the conditions of postponement of the issue of the committal warrant, and subsequently sent a formal refusal of the appellant's application for review of the terms of the suspended committal order so as to enable him to apply for judicial review.

On dismissing the application for judicial review the Divisional Court certified the following question as a point of law of general public importance: "Whether under s. 77(2) of the Magistrates' Courts Act 1980 justices have the power to vary the conditions upon which they have, on a previous occasion, postponed the issue of a warrant of commitment."

On leave to appeal being granted by the House of Lords:

Held: 1. The powers of a magistrates' court under s. 77(2) of the Magistrates' Courts Act 1980 to postpone the issue of a warrant of commitment on such conditions as the court thinks just may, by virtue of s. 12(1) of the Interpretation Act 1978, be exercised "from time to time as occasion requires" and accordingly the certified question would be answered in the affirmative. The case of *R. v. Clerkenwell Stipendiary Magistrate, ex parte Mays (supra)* was governed by corresponding statutory provisions in s. 65(2) of the Magistrates' Courts Act 1952 and s. 32(1) of the Interpretation Act 1889 and it therefore followed that it was wrongly decided.

2. The decision of the House of Lords *In Re Hamilton; In Re Forrest* [1981] A.C. 1038 that the issue of a warrant of commitment being a judicial act, natural justice required notice to be given to an offender of the intention to issue such a warrant notwithstanding that the offender was not required to be present at a hearing, applied, by parity of reasoning, not only to cases under what is now s. 82(5) of the Magistrates' Courts Act 1980 where the offender was in prison, but also to cases where the offender was subject to a postponed warrant of commitment under what is now s. 77(2) of that Act. The decision of the Divisional Court in *R. v. Chichester Justices, ex parte Collins* (1982) 146 J.P. 109; [1982] 1 W.L.R. 334 to the contrary was wrong.

Per curiam: Seemingly [in the present case] the Divisional Court had felt that the refusal [of an appeal committee of the House of Lords to grant leave to appeal in the *Chichester* case] indicated at least implied approval of the decision which it had been unsuccessfully sought to impugn. Counsel had surprised their Lordships by saying that this impression was widespread in the profession. If that were so... the sooner that erroneous impression was emphatically corrected by their Lordships the better. There was a multitude of reasons why, in a particular case, leave to appeal might be refused by an appeal committee.

Appeal allowed and case remitted to the Divisional Court.

Appeal: from a decision of the Queen's Bench Divisional Court refusing an application for judicial review of the refusal of an application by the appellant A.P. Wilson to the Colchester magistrates' court for the review of the terms of a suspended committal order made under s. 77(2) of the Magistrates' Court Act 1980.

Hospital order without convicting defendant — whether magistrates have power to make such an order when defendant has elected trial by jury — Mental Health Act 1983, s. 37(3).

The applicant who was charged with two offences, one of criminal damage and one of burglary, elected to be tried by jury and was remanded on bail. He was later arrested and charged with seven other offences of criminal damage and remanded in custody, but was unable to appear at the adjourned hearing owing to a mental disorder. At a subsequent hearing a voluntary medical report from a doctor at the prison prompted the question whether a hospital order under s. 37 of the Mental Health Act 1983 would be appropriate and an application by the defence solicitor for medical reports was granted by the justices. Thereafter the clerk to the justices formed the view that the justices had no power to require medical reports as the applicant had already elected trial by jury on the first two charges and, after hearing argument on the matter at the next hearing, the justices rescinded their order for medical reports. On application for judicial review:

Held: Following the decision in *R. v. Lincoln (Kesteven) Magistrates' Court ex parte O'Connor* (1983) 147 J.P. 96, [1983] 1 All E.R. 901 (which was based on the corresponding provisions of s. 60(2) of the Mental Health Act 1959) s. 37(3) of the Mental Health Act 1983 gave the justices power in an appropriate case to make a hospital order without convicting the accused and applied in relation to the first two charges against the applicant notwithstanding that he had elected trial by jury. Accordingly the matter would be remitted to the justices to consider whether or not they should exercise that jurisdiction which would require them to obtain medical reports.

Application: for judicial review by Lucien Kazmarek in relation to a decision by the Ramsgate justices that they had no power to order medical reports on the applicant on the ground that he had already elected to be tried by a jury.

R. v. Ramsgate Justices, ex parte Kazmarek Q.B.D. 16

Information — duplicity — single document setting out five offences with common preamble governing all offences — whether can be construed as five informations being set out in one document, or whether bad for duplicity as being one information charging five offences.

The appellant was charged with five offences under the Food Hygiene (General) Regulations 1970 which were set out in a single document. The document was in the form of a summons addressed to the appellant and contained a schedule which set out the five offences alleged numbered 1 - 5 preceded by a preamble governing the five offences as a whole in the following terms: "On May 12, 1982, at Burnells, 92 High Street, Croydon, being a person carrying on a food business, namely the trade or business of a retail confectioner, in the course of that business committed the five offences hereunder specified, contrary to the several provisions hereunder specified of the Food Hygiene (General) Regulations 1970 made under s. 13 of the Food and Drugs Act 1955, hereunder referred to as 'the said Regs.' ".

Overruling the contention of the appellant that the document did not contain five informations, but was one information charging five offences and was therefore bad for duplicity, the justices proceeded to hear the case and convicted the appellant on four of the five charges.

In allowing an appeal by way of case stated the Divisional Court held that on the authority of *Edwards v. Jones* (1947) 111 J.P. 324; [1947] 1 K.B. 659 the document could only be construed as one information charging five offences and was therefore bad for duplicity.

On leave to appeal being granted by the House of Lords.

Held: allowing the appeal:

1. Where, as in the present case, substantial factual material was common to a number of offences in contravention of various provisions of the same legislative instrument, the setting out of the common factual and legal material in a preamble in the document and the subsequent incorporation of it by express or implied reference in each of the ensuing paragraphs charging the several alleged offences, was an eminently sensible economy, and did not turn the document into a single information charging more than one offence.

2. *Edwards v. Jones (supra)* was a classic case of a single information charging alternative offences which was bad for duplicity. It arose from entirely different circumstances and gave rise to an entirely different question from those with which the present case was concerned.

Jurisdiction of justices to award costs in care proceedings — whether application to discharge care order is by way of complaint — does parent making such an application appear as complainant.

The applicant Juliet Stella Ball was the mother of a child Naomi Jose born on April 16, 1981. This child had been taken into care by virtue of an order under s. 1 of the Children and Young Persons Act 1969 vesting full parental rights in the County Council. On December 8, 1982 the mother successfully applied under s. 21(2) of the 1969 Act for this care order to be discharged. Consequently on August 5, 1983 after a hearing lasting eight days, the juvenile court discharged the care order, but after an application for costs by the mother, the justices decided that they had no power to award such costs.

The mother therefore challenged this decision by way of an application for judicial review to the High Court.

Held: The mother's application must fail since these proceedings were not brought by way of complaint.

The relevant power to award costs arose from s. 64(1) of the Magistrates' Courts Act 1980 which speaks of the magistrates' courts' discretion on the hearing of a complaint where the order asked for in the complaint is made, to make such order for the payment of costs to the complainant by the defendant as the court thinks "just and reasonable". Section 21(2) of the Children and Young Persons Act 1969 contains the statutory power enabling the local authority or the person in care to bring an application before the justices to discharge the care order; this power is extended by s. 70 (2) of the same Act to allow a parent or guardian to make such an application on behalf of the child or young person in care. In both of these subsections the statute speaks of an application and not a complaint.

Nevertheless some applications are sought by way of complaint where no other procedure is laid down. However, although there was no specifically designed form for the use of those wishing to apply to discharge a care order, when examining the prescribed forms used for commencing care proceedings, and indeed the forms used by the justices when an order is made as a result of care proceedings under s. 1 of the Children and Young Persons Act 1969, combined with due consideration of the wording in ss. 21(2) and 70(2) of the said Act, there is a clear inference that the court is hearing an application and not a complaint within the meaning of s. 64(1) of the Magistrates' Courts Act 1980. Accordingly the justices had no power to award costs at the conclusion of the proceedings.

Furthermore, even if the mother had been successful in establishing that the proceedings were by way of complaint, she herself could not properly be regarded as the complainant, since following *R. v. Gravesham Juvenile Court, ex parte B* (1983) 4 F.L.R. 312, where an application under s. 21(2) of the Children and Young Persons Act 1969 is made by the natural mother, she is not a party to the proceedings. Therefore, if one is not a party to the proceedings, one cannot be a complainant for the purposes of s. 64(1) of the Magistrates' Courts Act 1980 either.

Application: by Mrs. Juliet Stella Ball, the mother of Naomi Jose, for an order of mandamus to be addressed to the Salisbury and Tisbury and Mere Combined Juvenile Court, requiring the justices to consider an application for costs which she made to them on August 5, 1983.

Justice of the peace — liability for damages — anything done in the execution of his office — imprisonment ordered without jurisdiction — limitation of amount of damages under s. 52 of the Justices of the Peace Act 1979.

An order for the maintenance of four children was made in divorce proceedings and that order was sent to a magistrates' court for registration. Upon proceedings to enforce payment of arrears the magistrates were satisfied that default was due to wilful refusal or culpable neglect and that it was inappropriate to make an attachment of earnings order. The magistrates, who were not aware that they had no jurisdiction in the matter because the divorce court order had not in fact been registered in a magistrates' court, committed the defaulter to prison for six weeks. His application for the review of that order for imprisonment was considered by the magistrates' court and refused. He served the term of imprisonment and began proceedings against the magistrates for damages for unlawful imprisonment.

His application to quash the order for committal to prison was granted. The magistrates' liability for damages for what had occurred was accepted, and it was argued that liability was limited under s. 52 of the Justices of the Peace Act 1979.

Held: (1) An action may be maintained against a justice under s. 45 of the Justices of the Peace Act 1979 for an act done without jurisdiction, but under s. 52 of that Act a justice purporting to act in his capacity as a justice may be acting in the execution of his office notwithstanding that he is acting without jurisdiction;

(2) Since the defaulter was liable in law to pay the sum concerned and he had not suffered longer imprisonment than the law allows for such default, the conditions of s. 52(1) were satisfied and the maximum sum which could be awarded as damages was limited to one penny.

Application for judicial review treated as an action by writ for damages. **Preliminary point** as to whether the magistrates were entitled to the statutory limitation of the amount which could be awarded as damages.

Justices — liability for false imprisonment — extent of 'without jurisdiction or in excess of jurisdiction'.

The respondent appeared before Belfast Juvenile Court on July 6, 1978 charged with failing to attend an attendance centre in accordance with an order previously imposed by that court. The court, consisting of the resident magistrate and two lay justices, subsequently ordered that the respondent be detained at a training school. The respondent was not legally represented at any of his appearances before the court.

The respondent in due course applied to the Divisional Court in Northern Ireland for an order of certiorari to quash the training school order, relying on art. 15 of the Treatment of Offenders (Northern Ireland) Order 1976 (S.I. 1976 No. 226 (N.I. 4)), which provides, inter alia, that "a magistrates court... shall not pass a sentence of... detention in a young offenders centre on a

person who is not legally represented in that court and has not been previously sentenced to that punishment." Since the respondent had not been informed of his right to apply for legal aid in the later, separate, proceedings which resulted in the training school order being made, the proviso did not apply and the order was accordingly quashed.

The respondent subsequently issued a writ for damages for false imprisonment against the magistrates.

Held: Section 15 of the Northern Ireland Act 1964 (which is generally analogous in this respect to the Justices of the Peace Act 1979) consolidates the previous law in providing a complete defence to any action against magistrates in relation to matters arising from the execution of their office. However the 1964 Act further re-enacted, in ss. 15 and 16, that an action would stand where a magistrate has acted "without jurisdiction or in excess of jurisdiction". This accords with the principle stated by Lord Coke in *The Case of the Marshalsea* 10 Co. Rep. 68*b* (1613) that where the court has not jurisdiction in the cause actions will lie against it. Further the Act of 1964 provides that a magistrate against whom an action is brought arising from the execution of his office may be indemnified for expenses incurred in connexion with it, in s. 20, clearly contemplating that justices may be liable for acts so arising.

Once justices have entered upon the summary trial of a matter within their jurisdiction, only something quite exceptional in the course of the proceedings can oust their jurisdiction and leave them liable for civil damages, and an error of law or fact would not do this. However, although justices may have "jurisdiction in the cause" and conduct the trial impeccably, they may nevertheless be liable in damages if their determination on the cause does not provide a proper foundation in law for the sentence or order imposed. Quashing a decision or order by certiorari is not conclusive against justices on the issue of their civil liability (per *Pease v. Chayton* 3 B&S 620) but there is a long line of authority where certiorari has been granted against persons exercising limited jurisdiction have been held liable in damages for the consequences flowing from the exercise of that jurisdiction beyond its limit. The contention of Lord Denning M.R. in *Sirros v. Moore* [1975] Q.B. 118 that the immunity of inferior courts could be equated with that of superior courts, was rejected, and the test in the *Anisminic* case [1969] 2 AC 147 of acting without jurisdiction or in excess of jurisdiction has no application to s. 15 of the 1964 Act. It was established in *Sirros v. Moore* (*supra*) that a Judge in an inferior court will not be personally liable for an irregularity of procedure, although this may form good grounds for appeal.

In this case the justices' action was not merely a procedural irregularity but ran counter to the intention of art. 15(1) of the 1976 Order and since they had acted without jurisdiction the appeal was dismissed.

Appeal: from an order of the Court of Appeal in Northern Ireland reversing an order of Hutton, J. who decided a preliminary point of law in favour of the present appellants and dismissed the action brought by the present respondent for damages for false imprisonment.

In re McC (A Minor) (Northern Ireland) H.L. 225

Magistrates — dismissal of case after declining to receive prosecution evidence sought to be led — whether Divisional Court has power on judicial review to quash acquittal and order a rehearing of the case.

The defendant, Peter Arnold Roots, appeared before Dorking magistrates' court charged with assaulting a police officer in the execution of his duty and an offence under s. 5 of the Public Order Act 1936. At the start of the case the prosecutor applied for an adjournment as a witness was on leave. The defence did not object but informed the court of the dates when the defendant would be on holiday. After retiring the justices decided to adjourn the case to a date within that holiday period and when counsel for the defendant objected, the justices, stating that they were in a difficult position, dismissed the informations. The prosecutor invited the court to reconsider that decision pointing out that he was able to proceed with the case on the evidence available and

submitting that he should have been given the option to offer no evidence or to proceed. The justices having retired and consulted their clerk decided that their decision to dismiss the case would have to stand.

On application for a judicial review the Divisional Court, holding that there had plainly been a breach of the rules of natural justice by the justices and that their dismissal of the informations amounted to an acquittal on both charges, decided that it had no power to grant a judicial review since to do so would be to put the defendant in jeopardy a second time.

On leave to appeal being granted by the House of Lords.

Held: allowing the appeal:

1. The question as to whether there had been a failure to comply with the rules of natural justice was not the relevant consideration. The jurisdiction of a magistrates' court was founded on statute and the combined effect of ss. 9(2), 10(1) and 15(1) of the Magistrates' Courts Act 1980 was that in the circumstances of the present case, where the prosecutor was present and had evidence available which he desired to call, the justices, if they refused any application for an adjournment, must give the prosecutor the opportunity of calling the evidence, must then hear that evidence and also hear the parties and then adjudicate upon all that evidence. In acting as they did the justices acted in breach of their statutory duty under s. 9(2) of the Act.
2. An accused person was not, in the context of a plea of autrefois convict or autrefois acquit, in jeopardy merely because he was standing trial on a particular charge and in a popular sense was in jeopardy as being in peril of conviction. Jeopardy in the relevant sense only arose after a lawful acquittal or a lawful conviction. In the present case there was no trial at all; the dismissal of the informations was without jurisdiction and was a nullity.
3. Both on principle and authority there was no reason why mandamus should not have issued to the justices directing them to hear and determine the informations according to law, but as the prosecution sought no more than that the appeal be allowed, no other substantive order would be made.

Appeal: from a decision of the Queen's Bench Divisional Court (reported *sub nom: R. v. Dorking Justices, ex parte Harrington* (1983) 147 J.P. 437) dismissing an application for judicial review of a decision of the Dorking justices dismissing two informations against Peter Arnold Roots.

In Re Harrington H.L. 211

Magistrates — imprisonment in default of maintenance arrears — no restriction on committal of person not legally represented.

The defendant was committed to imprisonment in default of payment of maintenance and the issue of the warrant was postponed on terms. He failed to meet those terms and after a notice and a hearing in accordance with s. 18(1) and (3) of the Maintenance Orders Act 1958 the warrant was executed. He made a further application from prison under s. 18(4) but it was refused and he served the term of imprisonment.

Held: there was no obligation on the justices to inform him of the existence of legal aid. The ample statutory safeguards vitiate any need for such a rule under the heading of natural justice.

Application was refused on this and other grounds.

Application: for judicial review to quash orders of a magistrates' court for committal to prison and for the issue of that warrant.

R. v. Cardiff Justices, ex parte Salter Q.B.D. 721

Magistrates — whether threatening a witness is a contempt of court within s. 12(1)(a) of Contempt of Court Act 1981 — jurisdiction of Crown Court to hear appeal thereon.

The applicant was a witness in criminal proceedings before a magistrates' court against a defendant. Whilst they were both waiting in the foyer outside the court for the justices to consider their decision, the applicant threatened the defendant. The justices assumed jurisdiction under s. 12(1)(a) of the Contempt of Court Act 1981 and decided that by threatening the defendant the applicant was in contempt of court and they fined him £100. The applicant sought to appeal against the finding of contempt and the fine but the Crown Court Judge decided that he had no jurisdiction to hear the appeal. On application for judicial review of the decisions of the justices and the Judge.

Held: 1. The Contempt of Court Act 1981 was a penal statute and the word "insults" in s. 12(1)(a) must be given its ordinary English meaning. Accordingly the justices having found that the applicant had threatened the defendant, it was not open to them to decide that there had been a contempt within that section. Certiorari would be granted to quash the justices' decision.

2. It was unnecessary for the Court to express any final opinion on the decision of the Crown Court Judge but the Court would express the view, obiter, that the jurisdiction of a Crown Court Judge was limited to hearing an appeal against the penalty imposed by justices for contempt and did not extend to hearing an appeal against the actual finding of contempt.

Application: for judicial review by way of mandamus directed to the Crown Court Judge at Portsmouth requiring him to assume jurisdiction on appeal and/or by way of certiorari to quash a decision of the Havant justices that the applicant Alfred Victor Harold Palmer had been guilty of a contempt of court.

R. v. Havant Justices, ex parte Palmer Q.B.D. 609

Magistrates' court — child — interim custody order — no more than one such order on an application under s. 9 of the Guardianship of Minors Act 1971 — distribution of copies of welfare report — refusal to hear case more suitable for High Court — maintaining status quo in child's interest — content of welfare report.

A child's parents were living apart and, following a period of agreed staying access, the father refused to return the child to the mother on January 21, 1985. At the first hearing on February 4 of the mother's complaint to a magistrates' court for a custody order, the proceedings were adjourned to March 6, and an interim custody order was made to the father under s. 2(4) of the Guardianship Act 1973. On March 6 the proceedings were adjourned to April 2 and a further interim custody order was made. The hearing started on April 2 and was continued on April 3. It was then adjourned to May 22 and a further interim custody order was made.

The mother, complaining of several aspects of the proceedings in the magistrates' court, started High Court proceedings in the Queen's Bench Division for judicial review and in the Family Division by way of appeal by notice of motion. At that point the magistrates' court proceedings were stayed.

Held: that s. 2(5E) of the Guardianship Act 1973 precludes the making of more than one interim order on a complaint under s. 9 of the Guardianship of Minors Act 1971, and therefore the interim orders of March 6 and April 3 were made without jurisdiction. If on March 6 the magistrates' court had made an order purporting to continue the first interim order it could have been effective for a maximum of three months from that date.

By the Court: (1) When a welfare report has been prepared, it is insufficient for copies to be given to the parties 20 minutes before the hearing, particularly if the report is long (10 pages) and

contains allegations against a party which that party did not expect to have to meet.

(2) When after hearing evidence for two days it was clear that several more days might be needed, it would have been proper for the magistrates' court to consider that the matter might be more conveniently dealt with by the High Court and (under s. 16(4) of the 1971 Act) to refuse to hear the matter further.

(3) When considering an interim decision pending the completion of custody proceedings or an appeal against a custody order, the preservation of the *status quo* in the child's interest does not necessarily mean that the court should order the continuance of what is found to be existing. In this case the courts could properly look back and restore custody to the mother, that being the arrangement that had existed before the events which precipitated the court proceedings (involving periods of 14, 30 and 58 days in the magistrates' court and 140 days in the High Court).

(4) Attention should be drawn to the guidance as to the content of a welfare report in *Thompson v. Thompson* (1975) *The Times*, March 11, C.A., and *re W* (1983) 4 F.L.R. 492, C.A.

Order that the matter, being more suitable to be heard in the High Court, be not heard further in the magistrates' court: interim order for care and control to the mother with access to the father.

Application to the Queen's Bench Division for judicial review, and by notice of motion to the Family Division, in respect of part-heard custody proceedings and interim orders made by a magistrates' court.

Edwards v. Edwards Q.B.D. and Fam. Div. 661

iii

Mode of trial — charge of theft — defendant aged 16 at first appearance — plea of not guilty — remanded for summary trial — defendant attained age of 17 before the date of summary trial — whether defendant had right to elect jury trial.

The defendant, aged 16, appeared in the juvenile court to answer a charge of theft and entered a plea of not guilty. The case was adjourned for summary trial and for various reasons was not ready to commence until almost six months later. By this time the defendant had become 17 and sought to be allowed to elect trial by jury. The justices decided that the decision on the mode of trial had already been determined on the occasion of the case being adjourned for summary trial and it was therefore too late for the defendant to seek to elect trial by jury.

Held: The material date for determining whether a defendant was of age for electing jury trial was the date upon which the court made the mode of trial decision. That had been whilst the defendant was aged 16. Appeal dismissed.

Appeal: By way of case stated by the applicant for judicial review and an order of certiorari to quash the decision of the juvenile court whereby they refused his request to be allowed to elect trial by jury.

R. v. Lewes Juvenile Court, ex parte Turner Q.B.D. 186

Summary offence — whether magistrates' court has power to commit defendant to Crown Court for jury to decide fitness to plead — Criminal Procedure (Insanity) Act 1964, s. 4.

The appellant was charged with an offence under s. 4 of the Vagrancy Act 1824 punishable on

summary conviction with three months' imprisonment, namely that she was armed with an offensive weapon with intent to commit an arrestable offence. When the issue of the defendant's fitness to plead to the charge was raised the stipendiary magistrate decided that he had no power to commit her to the Crown Court for that issue to be determined by a jury under s. 4 of the Criminal Procedure (Insanity) Act 1964 as the offence was triable summarily only. He took the view that the proper course was to consider the use of his powers under s. 37(3) of the Mental Health Act 1983 to make a hospital order without proceeding to conviction. However, although the necessary medical evidence regarding the applicant's mental state was provided, suitable hospital accommodation was not available, so a hospital order could not be made. On application for judicial review of the magistrates' refusal to commit the applicant to the Crown Court for a jury to decide the issue of her fitness to plead.

Held: The relevant provisions of the Criminal Procedure (Insanity) Act 1964 applied only to a trial on indictment and s. 4 could not be invoked in relation to an offence which was triable summarily only. Moreover the jurisdiction of justices to commit a person to the Crown Court was limited by the Magistrates' Courts Act 1980, the relevant provisions of which restricted their powers to committals for trial for offences triable on indictment. Application refused.

Application: for judicial review and an order of mandamus directing that the applicant be committed to the Inner London Crown Court for a jury to decide if she was fit to plead to an offence triable summarily only.

R. v. Metropolitan Stipendiary Magistrates Tower Bridge, ex parte Aniifowosi Q.B.D. 7

Summary proceedings — whether justices can state a case on an interlocutory point of law before the final determination of the proceedings.

The appellant was charged on an information alleging that he sold a motor vehicle in an unroadworthy condition because of its dangerous parts and defective steering, contrary to s.60(3) of the Road Traffic Act 1972. At the outset of the proceedings it was submitted on his behalf that the information was bad for duplicity in that it alleged in effect two offences — one in respect of the dangerous parts and the other in respect of the defective steering. The justices overruled the submission and at the request of the defence adjourned the hearing pending the determination of an appeal by way of case stated against that decision.

Held: Following the *ratio decidendi* of the House of Lords' decision in *Atkinson* v. *United States Government* (1969) 133 J.P. 621; [1969] W.L.R. 1074 magistrates' courts have no jurisdiction to state a case under s.111(1) of the Magistrates' Courts Act 1980 unless and until they have reached a final determination on the information or complaint before them and, conversely, the Divisional Court has no jurisdiction to consider or determine such a case if the justices should nevertheless purport to state one.

Appeal dismissed and case remitted to the justices to continue the hearing.

Appeal: by way of case stated by the Dartford justices against their decision on an interlocutory point of law that an information preferred against Clive Francis Streames was not bad for duplicity.

The Divisional Court then certified the following question as raising a point of law of general public importance, but refused leave to appeal to the House of Lords:

"Whether on the application of a party to proceedings before them, justices have a power under s.111(1) of the Magistrates' Courts Act 1980 to state a case for the opinion of the High Court on an interlocutory determination by them of a point of law."

Streames v. Copping Q.B.D. 305

POLICE

Wilful obstruction of police — whether police are acting in the execution of their duty in stopping a convoy of striking miners believed to be intending to commit a breach of the peace at nearby collieries.

As a result of a trade dispute between the National Union of Mineworkers and the National Coal Board a number of police officers were stationed at junction 27 of the M.1 in Nottinghamshire, having reason to believe that striking miners from outside that county were intending to demonstrate and form a mass picket at one or more of four collieries situated within a distance of five miles from that junction. The object of the police was to stop cars carrying persons who appeared to be striking miners and dissuade them from taking part in any demonstration or mass picket and, if persuasion failed, to turn them back. The four appellants were travelling in a convoy of 25 cars which arrived at the junction carrying 60 to 80 men who, from their badges and the stickers on their cars, were clearly identifiable as striking miners.

The police told the men of their fear that a breach of the peace would occur if they continued and that if they did so they would be obstructing an officer in the execution of his duty and liable to arrest. The men conferred amongst themselves and then started to drive off in such a way as to block the exit from the motorway. They were advised of the danger the obstruction was causing and requested to move their vehicles. There was then an impasse of some 35 or 40 minutes during which there were angry shouts from the men at passing National Coal Board vehicles and other comments by the men which made it plain that they were intent on a mass demonstration or picket. After further warnings from the police 40 miners attempted to force their way through the police cordon and were arrested on the ground that if they proceeded the police feared a breach of the peace at one of the four collieries. The appellants were four of those who were arrested, charged and convicted of wilfully obstructing a police officer in the execution of his duty, contrary to s. 51(3) of the Police Act 1964 as amended. On appeal by way of case stated challenging the lawfulness of the police action:

Held: 1. If a constable apprehended on reasonable grounds that a breach of the peace might be committed, he was not only entitled, but was under a duty to take reasonable steps to prevent that breach occurring. Provided the police honestly and reasonably formed the opinion that there was a real risk of a breach of the peace in the sense that it was in close proximity both in place and time, then the conditions existed for reasonable preventive action, including, if necessary, the measures taken. The possibility of a breach of the peace must be real to justify any preventive action and the imminence or immediacy of the threat to the peace determined what action was reasonable.

2. On the facts found by the justice, a breach of the peace was not only a real possibility but also, because of the proximity of the pits and the availability of cars, imminent, immediate and not remote. The appeals would be dismissed.

Appeal by way of case stated by the Mansfield justices in relation to their conviction of the four appellants on a charge of wilfully obstructing a police officer in the execution of his duty.

Moss and Others v. McLachlan Q.B.D. 167

RATING AND VALUATION

Rating Law — jurisdiction of Crown Court to hear appeals against rejection of application for remission or rebate in respect of rates on empty premises — General Rate Act 1967, s. 7 and Courts Act 1971, s. 9.

The respondents owned an office block which at the material times was either wholly or partly

unoccupied. The appellants, being the rating authority, levied rates on the unoccupied parts of the premises in accordance with sch. 1 of the General Rate Act 1967, as amended. The respondents applied to the rating authority for remission or rebate on the ground of hardship. This application was rejected. The respondents sought to appeal to the Crown Court against this rejection, on the basis of s. 7(1)(c) of the 1967 Act, namely that they were aggrieved by an act or thing done by the rating authority. However, the Crown Court held that it had no jurisdiction to hear the appeal because if it did so, and allowed the appeal, it would have no powers available to dispose of the matters. On appeal by the present respondents to the Divisional Court, Hodgson, J. held that the Crown Court did have jurisdiction because if regard was had to s. 9 of the Courts Act 1971, which was not cited in the Crown Court, it became clear that, having dealt with the appeal, the Crown Court would have very wide powers to confirm, reverse or vary the decision appealed against; to remit the matter to the rating authority; or to make such order as the court thought fit. On appeal by the rating authority to the Court of Appeal.

Held: (dismissing the appeal) (i) the determination of the respondents' application was clearly an act or thing done by the rating authority, and therefore on the plain wording of s. 7(1)(c) of the 1967 Act the respondents had a right of appeal to the Crown Court; and (ii) if the Crown Court allowed the appeal it would have power to dispose of the case not only by virtue of s. 9 of the 1971 Act but also by virtue of s. 7 of the 1967 Act itself.

Appeal against a decision of Hodgson, J., sitting in the Divisional Court on May 16, 1984, ((1984) 148 J.P. 726), allowing an appeal against a decision of the Crown Court that the Crown Court had no jurisdiction to hear the present respondents' appeal under the General Rate Act 1967, s. 7(1)(c) against a decision of the present appellants.

ROAD TRAFFIC ACTS

Driving whilst disqualified — defendant being towed — meaning of "motor vehicle" — whether Recorder correct to direct jury to convict.

The appellant appeared before the Crown Court at Liverpool on a charge of driving whilst disqualified and was convicted by direction to the jury from the Recorder.

The evidence established that the appellant (a disqualified driver) was seen at the wheel of an Austin 1300. This car was being towed with a rope by another car. The appellant at the close of the prosecution case made a submission that there was no case fit to go before the jury on the basis that the prosecution had not proved that the Austin 1300 was a "motor vehicle" as defined by s. 190(1) of the Road Traffic Act 1972. The Recorder rejected this submission, and when no evidence was subsequently called for the appellant, he directed the jury to return a verdict of guilty, since he ruled that as a matter of law, there being nothing to suggest otherwise, the car in question was a motor vehicle within the meaning of the statute.

Held: Having regard to the evidence before the Court, there was undoubtedly a prima facie case to answer since there was no evidence on which the jury at Liverpool Crown Court could have found that the Austin 1300 was other than it appeared to be, namely, a motor vehicle (albeit broken down) within the meaning of the definition of s. 190(1) of the Road Traffic Act 1972. Nevertheless the Recorder had been wrong to direct the jury to convict since the jury alone have the right to decide that the accused is guilty on the evidence put before them and the Judge has no power to pre-empt the jury's verdict.

However, although the course taken by the Recorder in this case had constituted "either a wrong decision on a question of law" or "a material irregularity in the course of the trial" or both, the Appeal Court was satisfied that no miscarriage of justice had been caused and therefore the

conviction was upheld by virtue of the application of the proviso to s. 2 of the Criminal Appeal Act 1968.

Appeal: by Robert Challinor against his conviction at Liverpool Crown Court.

R. v. Challinor C.A. 358

Driving without due care and attention — s. 3 Road Traffic Act 1972 — fatal accident — whether consequences of accident relevant to sentence.

The appellant, a man of no previous convictions, rose his motorcycle through a red light and collided with an elderly male pedestrian who subsequently died of injuries sustained in the accident. He was acquitted of causing death by reckless driving, but was convicted of careless driving and fined £350. His driving licence was endorsed with five penalty points.

He appealed against sentence and it was submitted that there were no aggravating features such as an excess of alcohol or excessive speed. There was on the other hand evidence from the police that the appellant's vehicle was well maintained and that he had shown great concern for the victim. The appellant argued that insufficient weight had been given by the trial Judge to his good character and modest means. It was further submitted that the fine was greatly in excess of the recommended figure of the Magistrates' Association and that the result of the accident should not have been taken into account, but that the main criterion was the actual culpability or degree of carelessness, whereas the trial Judge in passing sentence had, according to counsel for the appellant, said that it was a serious case because death resulted.

Held: allowing the appeal and reducing the fine to £250.

The case was a serious one inasmuch as the defendant admitted that he failed to appreciate the lights were changing to red — it was not a case of momentary inattention and it was open to the Judge to conclude, if not inevitable that he would, that the appellant fell far below the standard of a reasonably competent motorcyclist. The fact that the Judge imposed a fine in excess of the guideline laid down by the Magistrates' Association was not in itself a ground for allowing the appeal as the offence was a serious one and the penalty imposed was well below the maximum. The offence called for a higher figure than the norm for an average offence. However, the consequences of the accident were not relevant to the penalty (unforeseen and unexpected) and as it seemed that they did influence the trial Judge to some extent some reduction in the amount of the fine was appropriate. The primary considerations in assessing the penalty were the quality of the driving and the extent to which the driver fell below the required standard of the reasonably competent driver.

R. v. Krawec C.A. 709

Penalty points — s. 19 Transport Act 1981 — more than one offence — meaning of "committed on the same occasion."

The appellant pleaded guilty to two offences contrary to s. 143 of the Road Traffic Act 1972, namely using a motor vehicle without insurance. He owned two vehicles, used both of them on a road on the same date as he was taking parts from one to improve the other, with the intention of later scrapping the first vehicle. Neither vehicle was covered by insurance and he pleaded guilty to both offences but contended that they were committed on the same occasion for the purpose of s. 19(1) of the Transport Act 1981 and that therefore the only points to be imposed on his licence should be those in respect of the one offence for which the justices intended to impose the higher number. The justices decided that the offences were not committed on the same occasion and consequently ordered points in respect of each offence to be endorsed. It was submitted on behalf

of the appellant that both offences were committed on the same occasion, namely when the police officer discovered they were not covered by insurance. The respondent was not represented and had not made any submission on the point before the justices.

Held: It was not a question of law whether or not the offences were committed on the same occasion but each case would depend upon its individual facts. Commonsense dictated in this case that having regard to the use made of the vehicles at the material time, the offences were committed on the same occasion. Any other conclusion would be perverse once it was appreciated that it was a question of fact.

Appeal allowed: case remitted to justices for their order to be amended and the appropriate number of points to be imposed.

Johnston v. Over Q.B.D. 286

Provision of specimen for analysis under s. 8 Road Traffic Act 1972 — requirement made by police officer under s. 8(3) — exercise of discretion under s. 8(4) — duty of police officer under that subsection.

The respondent was arrested under the provisions of s. 7(5)(b) of the Road Traffic Act 1972 having failed to supply a specimen of breath when required to do so by a police officer who stopped him for fast and erratic driving and then smelt alcohol on his breath. He was taken to a police station where no approved evidential breath testing device was operative and was required to provide a specimen of blood for analysis in accordance with s. 8(3). He refused to do so and was charged with an offence contrary to s. 8(7). He then offered to supply a specimen but was told it was too late. He was convicted by a magistrates' court of the offence contrary to s. 8(7) and appealed successfully to the Crown Court, submitting that the officer was obliged by s. 8(4) to apply his mind to the question of what sort of specimen to require and that the officer in this case, who followed a police pro forma guide to the procedure, had not done so. The prosecutor appealed by way of case stated to the Divisional Court.

Held: The Crown Court had misconstrued the terms of s. 8(4) and inserted an additional requirement. The Act made it the responsibility of the police officer to decide what specimen to ask for and did not give the subject of the investigation at that stage the right to challenge the decision except upon medical grounds. The subsection contained a proviso that the specimen should be of urine if a medical practitioner was of the opinion that for medical reasons blood could not or should not be taken, but the officer was not required to make a conscious decision or to weigh up the particular circumstances. It was sufficient for the officer to require one or the other on the grounds of policy. Nothing in the statute required him to give or to have reasons for his decision. Whether the specimen was refused without reasonable excuse or not was of course an issue for the court hearing the charge, but the Crown Court should not have stopped the case before reaching that stage.

Case remitted to Crown Court for hearing to continue.

Costs from central funds to both parties.

Pine v. Callacott Q.B.D. 8

Road Traffic Act 1972 — s. 6(1) as amended — driving with excess alcohol — evidence of drink after driving completed — standard of proof required to satisfy s. 10(2) as amended.

The respondent was prosecuted for an offence of driving a motor vehicle having consumed

excess alcohol, contrary to s. 6(1) (as amended) of the Road Traffic Act 1972. At his trial he gave evidence that he had consumed only two pints of beer before he drove and consumed a third pint after he had ceased driving but before he gave a specimen of breath for analysis. The specimen gave a reading of 53 mg. of alcohol in breath, equivalent to 122 mg. of alcohol in blood. He produced an article from the British Medical Journal containing a table of effects of measures of alcohol in common drinks upon levels of alcohol in blood and invited the justices to infer from it that but for the third pint the level of alcohol in his breath would not, on the balance of probabilities, have exceeded the prescribed limit. The extract from the B.M.J. was accepted by the prosecution and no scientific evidence was called by either side. The justices acquitted the defendant and the prosecution appealed by way of case stated, the question for the court being "whether the justices were right in dismissing the charge having regard to the provisions of s. 10(2) of the Road Traffic Act 1972 as amended by the Transport Act 1981 having regard to the evidence given by the defence which did not include any medical or other expert evidence."

Held: allowing the appeal —

Although, applying dicta of Widgery, L.C.J. in *Pugsley v. Hunter* there were cases were expert evidence would not be necessary to support such a defence, that would only be the case if a layman could reliably and confidently say that the extra liquor accounted for the excess alcohol. Unless the case was a really obvious one it was necessary for the defendant to call expert evidence although the onus was only to satisfy the court on the balance of probabilities that drink consumed after driving ceased was sufficient to cause the alcohol level to exceed the prescribed limit and that but for that drink the level would have been below the limit. In this case the justices were wrong to attempt to evaluate the scientific evidence in the journal without the aid of expert evidence. Those who were not scientifically qualified should not dabble as amateurs in science — this applied to all sitting on the bench, whether lawyers or lay justices. Furthermore, on the evidence before them, they could only have concluded that the defendant had not discharged the burden of proof upon him.

Case remitted to justices with a direction to convict.

Dawson v. Lunn Q.B.D. 491

Section 6(1)(a) Road Traffic Act 1972 — use of Lion Intoximeter — whether production of print-out essential — whether evidence of operator hearsay.

The defendant was arrested by police officers having provided a positive specimen of breath at a roadside test and was taken to the police station where he provided samples of breath for a Lion Intoximeter machine. The lower of the two samples showed a reading of 63 mg. of alcohol in 100 ml. of breath. No copy of the print-out produced by the machine was given in evidence at the trial but the police officer who conducted the tests gave evidence on oath as to the result of the test. It was submitted successfully that the oral evidence of the police sergeant as to the reading was inadmissible on the grounds that the test record, the print-out, had not been served on the defendant within the statutory seven days as required by s. 10 subs. 5 of the Road Traffic Act 1972 as amended and the justices acquitted. The prosecutor appealed by way of Case Stated and the question for the Court to determine was whether in view of the provisions of s. 10(3) of the Road Traffic Act 1972, evidence of the proportion of alcohol in the defendant's breath could be given by way of oral evidence on oath by the officer conducting the test without the production of the print-out. It was submitted by the appellant prosecutor that the language of s. 10(3) was permissive and did not dictate the only way in which evidence of the intoximeter reading could be adduced. It was further submitted on behalf of the appellant that oral evidence by the officer was not hearsay as it was evidence on readings on the machine's dials which were visible to the respondent no less than to the police officer conducting the test. It was submitted by the respondent that oral evidence by the police officer was hearsay or at best secondary evidence. Subsection 10(3) clearly contemplated that evidence of the readings could be produced only by the statement automatically produced by the machine and such statements had to be given to the

defendant either at the time or not less than seven days before the hearing. It was submitted that this was to give the accused adequate opportunity to study the evidence before the hearing. This safeguard introduced by the legislation would be removed if oral evidence alone sufficed.

Held: Although the evidence of the police officer would not be considered hearsay as it was direct evidence of what he had seen and recorded on the machine, nonetheless that evidence did not and could not come to the standard of proof required by the legislation. It was clearly the intention of the legislation that the defendant should be provided in advance of the hearing with the information recorded on the automatically produced statement. Not only did this record the amount of alcohol measured by the machine, (which the defendant might not remember perfectly) but it gave details of the self calibrating exercise and if the figures produced by the instrument were to be relied on by the prosecution, it was essential the prosecution should establish the machine was properly calibrated.

Appeal dismissed.

Owen v. Chesters Q.B.D. 295

Section 8(7) Road Traffic Act 1972 — requirement to provide a specimen for laboratory analysis — use of Lion Intoximeter 3000 machine — availability of reliable device — meaning of reliable.

The appellant was the defendant in proceedings before a magistrates' court where he was charged with failing to provide a specimen for laboratory analysis when required to do so by a police constable, contrary to s. 8(7) of the Road Traffic Act 1972 as amended by the Transport Act 1981. The defendant was arrested for failing to provide a specimen of breath for a roadside breath test and taken to the police station. There he was required to provide two specimens of breath for analysis by means of a Lion Intoximeter 3000 machine. The date was February 28, 1984 and the first specimen was provided at 11.59 p.m. The second specimen was provided at 00.01 on February 29 but the machine produced a printout giving the date of March 1. The officer administering the test came to the conclusion that the machine was not working correctly and relying upon s. 8(3)(b) of the Act required the defendant to provide a specimen of blood for analysis. At first he agreed but subsequently he refused and was charged with an offence under s. 8(7). He was convicted by the justices and appealed by way of Case Stated. It was contended on behalf of the appellant that the basic function of the machine was to produce an analysis of the amount of alcohol in the breath of the motorist in question. The prosecution could have produced the print-out but instead of using s. 10(3)(a) in relation to it (which provides that the print-out from an authorized machine is admissible as evidence of the content of alcohol), oral evidence could have been given by the police officer as to the results of the analysis as he observed the operation of the machine. Therefore the machine was reliable and available at the police station at the time the requirement for a specimen of blood was made and consequently that requirement was unlawful.

Held: The Court was not concerned with the possibility of proving an offence of driving with excess alcohol by using oral evidence as well as the print-out produced by the Intoximeter. The question simply was whether the appellant was guilty of failing to provide the specimen of blood. For that purpose the Court had to decide whether or not at the time the requirement was made a reliable device was available at the police station. If the machine was not capable of producing an accurate date on the print-out it could not be said to be reliable within the words of s. 8(3)(b).

Appeal dismissed.

Slender v. Boothby Q.B.D. 405

Road Traffic Act 1972 s. 8(7) — requirement to supply specimen for analysis — Intoximeter not producing printout — whether operative or not — whether request to supply blood for analysis lawful or not.

The respondent was driving in such a way as to cause a police car to brake sharply and to take avoiding action. He was stopped by the police and required to provide a specimen of breath in pursuance of s. 7(1)(a) of the Road Traffic Act 1972 being suspected of having committed a moving traffic offence. He was arrested after the test proved positive. He was taken to the police station where he provided two specimens of breath for the Lion Intoximeter 3000. The results were recorded by the officer as they appeared on the digital display but no printout was produced. The officer declared that the machine was inoperative and asked for a specimen of blood in pursuance of the provisions of s. 8(3) of the Act. The respondent refused to supply it. The justices dismissed the charge, taking the view that as there was no statutory or other reason why the officer could not give evidence of the results of the analysis as displayed upon the machine, it could not be said that a reliable device was not available. Therefore, the officer could not make use of s. 8(3)(b) of the Act. The prosecutor appealed by way of case stated and the question for the opinion of the Divisional Court was whether a police officer was lawfully entitled to require a driver who had provided a roadside specimen and two specimens of breath for analysis at a police station to provide an additional specimen of blood under s. 8(3)(b) because the device used for analysis failed to produce a printed certificate of analysis.

Held: dismissing the appeal, following *Owen v. Chesters* (1985) 149 J.P. 295 a police officer may give evidence of results of a breath test which he has seen on the display panel of an Intoximeter 3000 although it could not be relied upon without evidence that the self-calibrating exercise of the machine had proved satisfactory. The value of the printout was that by s. 10(3) of the Act it was evidence of the amount of alcohol in breath, but the failure of the machine to produce a print-out could be but was not necessarily an indication that the device was not at the time of use reliable. If however what was observed on the display panels showed that the device was working satisfactorily, failure to produce a printout would not render the whole of the device unreliable. The police officer was not entitled therefore to require a blood test — he should have proceeded under s. 6(1) using evidence of what he had seen on the display panels.

Appeal dismissed.

Morgan v. Lee Q.B.D. 583

Section 10 (3) Road Traffic Act 1972 as amended — service of copy print-out upon motorists — validity of unsigned copy — meaning of copy.

The respondent provided specimens of breath for analysis into a Lion Intoximeter machine under s. 8 of the Road Traffic Act 1972 as amended and the machine produced four identical print-outs of the test record and certificate showing that the lower of the two specimens provided contained 75 mg. of alcohol in 100 ml. of breath. At least two of the print-outs were signed by the respondent and one of these was signed by the officer conducting the test and was retained by her. She gave the respondent a copy of the print-out which had been signed by him but not by her or any other police officer. At his trial for the offence contrary to s. 6(1) of the Road Traffic Act 1972 the justices accepted a submission that the missing signature on the document handed to the defendant rendered it different from the document tendered by the prosecution in evidence and it was therefore inadmissible as it could not be said to be a copy. It was submitted by the appellant that the omission of the signature was not material and therefore the document given to the respondent did not cease to be a copy of the document produced in evidence by the prosecution. The justices concluded that the document was not a copy and was therefore not admissible. They were then asked to hear further evidence and allowed the officer in the case to give evidence of the

readings she had seen displayed on the intoximeter while taking samples from the respondent. Following further submissions they formed the opinion that her evidence to what she had seen was unreliable in that it could not necessarily be regarded as what the machine actually recorded. Accordingly they found no evidence against the respondent and dismissed the charge. The prosecutor appealed by way of Case Stated and the two questions for the Court were:

(1) Whether the prosecution had failed to comply with the requirement of service according to s. 10(5) of the Road Traffic Act 1972 when an unsigned copy of the statement produced by the machine was served on the defendant.

(2) Whether the prosecution was precluded from calling oral evidence from a trained operator of the device as to the reading given on the visual display of the machine.

It was submitted on behalf of the respondent that the copy of the signed document must include the signature and that if there were any doubt about the meaning of the word "copy" it should be resolved in favour of the respondent. Part of the protection offered by s. 10(5) is the fact that the identity of the officer conducting the test could be established and was therefore important that any copy that went out should be signed.

Held: The matter of oral evidence as to the reading of the machine had been covered in the case of *Owen v. Chesters* (1985) 149 J.P. 295 decided earlier by the same Court. As to the meaning of "copy", in ordinary English the officer would be bound to say that the unsigned print-out she gave to the defendant was a copy of the signed print-out she had kept herself. If the legislature had intended that the copy of the document must be signed it would have said so.

Appeal: allowed — case remitted to justices with direction to convict.

Chief Constable of Surrey v. Wickens Q.B.D. 333

Transport Act 1981 — calculation of penalty points — offences dealt with before commencement of Transport Act 1981 — offences committed on different occasions — but sentenced together — whether one order for endorsement or more — effect upon s. 19 of that Act.

On June 25, 1980 the respondent was convicted and had his licence endorsed in respect of eight road traffic offences committed on three separate occasions. All the offences were dealt with together. In March 1983 he was convicted of an offence of driving without due care and attention contrary to s. 3 of the Road Traffic Act 1972 the date of offence being December 20, 1982. Four penalty points were imposed and the respondent was disqualified pursuant to s. 19 of the Transport Act 1981 for six months. He appealed successfully to the Crown Court which quashed the order for disqualification and left the order for four penalty points to stand. The prosecutor appealed by way of case stated, submitting that s. 19(7)(a) of the Transport Act 1981 which deals with order for endorsement made before the commencement of the Act should be read in conjunction with s. 19(1) which requires points to be ordered for offences committed on separate occasions albeit sentenced together. Thus the convictions of June 25, 1980, should take effect as an order for nine penalty points for the purposes of s. 19(2).

Held (dismissing the appeal): It was a question of construction of a penal statute and therefore the words of s. 19(7)(a) had to be construed strictly. There was no need to read it in connexion with subs. (1). This began with the words "Where a person is convicted of an offence" and therefore had to refer to convictions after the coming into force of the Act. The order of June 1980 was an order for the endorsement of eight offences and was one order, not eight or three orders. It therefore took effect as an order for three penalty points for the purposes of s. 19(7)(a) of the Transport Act 1981 which deals with orders for endorsement made consequence upon the old law in respect of the offences committed before the new Act came into force. The conclusion of

the court was consistent with a perfectly comprehensible intention on the part of Parliament to that effect.

Costs to appellant and respondent from public funds.

David John King v. Marcello Luongo Q.B.D. 84

THEFT

Conspiracy to steal — construction of s. 6(1) Theft Act 1968 as affecting 'dishonest intention permanently to deprive' demanded by s. 1 Theft Act 1968 — whether offences of statutory conspiracy and common law conspiracy to defraud are mutually exclusive.

The three appellants were all appealing against convictions at the Central Criminal Court of conspiracy to steal. Originally there had been three counts of: conspiracy to steal feature films contrary to s. 1(1) of the Criminal Law Act 1977, conspiracy to defraud contrary to common law and a third count of handling stolen goods which was not pursued. The second count was ruled not to be proceeded with after argument before the Judge, but it remained on the file.

The evidence had established that the appellant Lloyd had been employed as chief projectionist at a cinema and was involved with his two co-defendants in that he supplied them with the films that were due to be shown at the Odeon where he worked. The co-defendants had the films in their possession for long enough to make copies of them, thereby enabling them to sell the pirated copies on the market to the great financial benefit of themselves, and consequently enormous financial detriment of the lawful owners of the films. The success of the scheme depended on the appellants Bhuee and Ali only keeping the films long enough (usually just a few hours) to make the copies so that Lloyd could replace the original films before their absence had been detected. Eventually the appellants were caught red-handed carrying out just such a copying exercise.

The appellants appealed against their convictions on the basis that the Judge had misdirected the jury first of all in leaving them to decide the question whether a removal of a film in these circumstances could amount to theft, and secondly, in allowing them to consider s. 6(1) of the Theft Act 1968 as being relevant at all in the circumstances of this case.

It was further submitted that the second count of conspiracy to defraud which had been left on file should not be reactivated as an alternative to a statutory conspiracy to steal contrary to s. 1(1) of the Criminal Law Act 1977, since the two were mutually exclusive counts.

Held: The convictions for conspiracy to steal would be quashed, and the second count would not be reactivated. On the wording of s. 1(1) of the Theft Act 1968 above, these appellants would not be guilty of theft or conspiracy to steal, since the intention of the appellants could more aptly be described as an intention only *temporarily* to deprive the owner of the films. In deciding whether s. 6(1) of the Theft Act 1968 would give the appellants the necessary intention permanently to deprive, the Court was only concerned with the second part of that subsection, namely the words: "and a borrowing or lending of it may amount to so treating it, but only if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal".

The Lord Chief Justice felt that generally s. 6 should only be referred to in exceptional circumstances; it seeks to clarify the meaning of the words "intention of permanently depriving", and does not cut down the definition of theft contained in s. 1. Borrowing is *ex hypothesi* not something which is done with an intention permanently to deprive. The second half of s. 6(1) is intended to make it clear that a mere borrowing is *never* enough to constitute the necessary guilty mind unless the intention is to return the 'thing' in such a changed state that it can be said that all its goodness or virtue has gone. The view of the Court of Appeal was that the films which were the subject of the alleged conspiracy had not in these circumstances themselves diminished in value at all, and therefore did not fall into the category of being in such a changed state. The most that could be proved here was a conspiracy to contravene the provisions of the Copyright Act 1956.

The Court of Appeal also decided that the second count of conspiracy to defraud contrary to common law should not be reactivated; s. 5(2) of the Criminal Law Act 1977 preserves the offence of conspiracy to defraud at common law as an exception to the general abolition of the offence of common law conspiracy by s. 1(1) of the said Act. Following the decision of the House of Lords in *Ayres* (1984) 148 J.P. 458; (1984) 78 Cr. App. R. 239, per Lord Bridge, there is only a stark choice of alternatives now left — a common law conspiracy to defraud must be charged as such and not a statutory conspiracy under s. 1, and conversely a s. 1 conspiracy cannot be charged as a common law conspiracy to defraud notwithstanding that the commission of the substantive offence would involve an element of fraud.

Appeal: By Sidney Douglas Lloyd, Ranjeet Bhuee and Mohammed Chaukal Ali against their conviction at the Central Criminal Court on February 5, 1985, of conspiracy to steal.

R. v. Lloyd, Bhuee and Ali C.A. 634

Making off without payment — whether intention to make permanent default on payment is required — Theft Act 1978, s. 3(1).

The respondent left the hotel where he had been staying without paying his bill and telephoned two days later to explain that he was in financial difficulties and arranged to return to the hotel to remove his belongings and leave his Australian passport as security for the debt. He was arrested on his return and later charged with making off without payment contrary to s. 3(1) of the Theft Act 1978. At his trial at the Crown Court his defence was that he had acted honestly and had genuinely expected to pay his bill from the proceeds of various business ventures. Following a ruling from the Judge as to the meaning of "and with intent to avoid payment" within s. 3(1) of the Act he was convicted. On allowing his appeal against conviction the Court of Appeal (Criminal Division) certified the following point of law as of general public importance:

> "Upon a construction of the words "with intent to avoid payment" in s. 3(1) of the Theft Act 1978, namely, whether an intention to make permanent default on payment is required."

On leave to appeal being granted by the House of Lords:

Held: Dismissing the appeal. To secure a conviction under s. 3(1) of the Theft Act 1978 it must be proved that the defendant in fact made off without making payment on the spot:
(a) with knowledge that payment on the spot was required or expected of him,
(b) dishonestly, and
(c) with intent to avoid payment of the amount due.
In that context "with intent to avoid payment" meant an intention to do more than delay or defer, it meant an intention to evade payment altogether.

Appeal: from a decision of the Court of Appeal (Criminal Division) allowing an appeal by the respondent Christopher Allen against his conviction for an offence of making off without payment contrary to s. 3(1) of the Theft Act 1978.

R. v. Allen H.L. 587

Section 20(2) Theft Act 1968 — procuring the execution of a valuable security by deception — traveller's cheques — meaning of execution — bank honouring the cheques despite knowing they were forgeries — deception practised on the agent

cashing the cheque but no deception on the bank which finally honoured the forged cheque — whether an offence under the section is made out in respect of the bank.

The defendant by deception cashed stolen and forged traveller's cheques in France and the cheques were then passed through normal banking channels to England where, despite that they were known to be forgeries, they were honoured by the bank. The bank was not legally liable to honour the cheques but considered themselves obliged, as a matter of good commercial practice, to pay out to the foreign agents that had cashed them. The defendant appealed against his conviction by the Manchester Crown Court and contended that (1) "procure" meant "produce by endeavour" rather than merely "cause" and (2) there was no evidence to establish that the appellant had endeavoured to produce the action of the bank in paying money to anyone else in respect of the traveller's cheques.

Held: (1) For the purposes of the section "execution" can include any acceptance and payment on the cheque and there may be a series of executions in respect of one cheque as it passes through the banking system.

(2) For the purposes of the section the word "procure" has no special meaning and its most common meaning is to cause or to bring about.

(3) The existence of legal and/or commercial reasons for paying out on a forged cheque were relevant in considering whether a defendant had procured payment and it is sufficient even if the defendant's action was not the only reason for the bank paying on the cheque.

Appeal: by Brian Beck against conviction at the Manchester Crown Court.

R. v. Beck Q.B.D. 260

TRADE DESCRIPTION ACTS

Application for judicial review — informations under s. 1(1)(a) and (b) Trade Descriptions Act 1968 — oral statements — whether six months' time limit in s. 19(4) Trade Descriptions Act 1968 applies — s. 127 of the Magistrates' Courts Act 1980.

The applicants were charged with offences under s. 1(1)(a) and (b) of the Trade Descriptions Act 1968 in relation to false oral statements concerning the mileage and other matters relating to a motor car. The informations were laid on February 17, 1984, over six months from the date on which the offences were alleged to have been committed, namely July 23, 1983. Section 19(1) of the 1968 Act provides that proceedings should be commenced within three years of the commission of the offence or one year from its discovery by the prosecutor, whichever is the earlier. The combined effect of subss. 19(2) and (4) and s. 127(1) of the Magistrates' Courts Act 1980 in respect of, inter alia, oral misdescriptions was that a six month time limit was to apply. Section 127(2) of the 1980 Act provides that nothing in subs. (1) of that section or any other enactment which would impose a time limit on the power of a magistrates' court to try an information summarily, shall apply to an indictable offence. On behalf of the justices, it was submitted that as these offences are properly described as indictable, namely "hybrid offences', then s. 19(4) can have no application and the informations were laid in time. On application for judicial review.

Held: As the offences were properly called indictable s. 19(4) of the 1968 Act had no application; consequently, despite the fact that the alleged misdescriptions were oral and the

informations were laid outside the six month period, the justices were not precluded from hearing them.

Application for judicial review of the decision of the Dacorum justices.

False trade description — s.1(1)(a) and (b) Trade Descriptions Act 1968 — whether proceedings time-barred — s.19(1) Trade Descriptions Act 1968.

On August 31, 1982 a complaint was received by the appellant council concerning the misdescription of a food mixer. The complainant alleged that she had received a leaflet claiming that a slicer/shredder attachment was included in the price of a certain type of mixer. The model supplied to her did not include such an attachment. On September 8, 1982 a trading standards officer visited the respondents' store and was provided with a leaflet which contained the claim that a slicer/shredder was included in the price of a mixer. The next day, accompanied by a colleague, he returned to the store and discussed the matter with employees of the respondents. It was admitted by the latter that the mixer did not include the stated attachment. The information were laid unde s.1(1)(a) and (b) of the Trade Descriptions Act 1968 on September 8, 1983. The magistrates dismissed them on the basis that they were statute barred. Section 19(1) of the 1968 Act requires an information to be laid within three years of the commission of the offence or one year from its discovery by the prosecutor, whichever is earlier. On appeal to the Divisional Court.

Held: The discovery of the offence did not take place until September 9, 1982. The fact that a complaint had been made prior to that date was of no relevance so far as the establishment of the ingredients of the offences of September 9 were concerned.

Appeal by way of case stated from the decision of the North East London Justices.

Trade description — false car mileometer reading — sale by private treaty by auctioneer — whether oral disclaimer could satisfy "all reasonable precautions" and "all due diligence" requirements in s.24 Trade Descriptions Act 1968.

The respondent sent a motor car for auction sale. The vehicle had travelled in excess of 115,000 miles but the mileometer only showed a reading of some 28,000 miles. It was accepted by the justices as a bona fide act that a new mileometer had been fitted. The vehicle was taken to auction by an employee of the respondent. The vehicle failed to reach its reserve price and was withdrawn from the sale. It was sold by the auctioneer by private treaty to a motor trader who was told by the auctioneer that the mileage was genuine. In evidence the respondent stated that he knew the mileage was not genuine and that he had told his employee to inform the auctioneer that the mileage was not guaranteed. The respondent was charged under s.1(1)(b) of the Trade Descriptions Act 1968 with supplying a motor vehicle to which a false description was applied, namely the false mileometer reading. He sought to rely on the statutory defence in s.24(1) of the 1968 Act on the basis that the oral disclaimer his employee was instructed to give amounted to the exercise of "all reasonable precautions" and "all due diligence". The justices found the defence was made out. On appeal by the prosecutor.

Held: that there was ample evidence for the conclusion of the justices. No single test can be laid down to determine what amounts to all reasonable precautions and all due diligence in any given situation (*Zawadski v. Sleigh* [1975] R.T.R. 113 considered).

Trade descriptions — false mileometer reading — time for bringing of prosecutions — when was offence by prosecutor — s. 19(1) Trade Descriptions Act 1968.

The applicants were charged with three offences contrary to s. 1 of the Trade Descriptions Act 1968, in that in the course of a trade or business they applied a false trade description concerning its mileage to a motor car and also that they supplied the same vehicle to which a false statement as to mileage had been applied. The facts giving rise to the informations had all occurred at the latest by March 3, 1983, but the informations were not laid until March 25, 1984, well over 12 months later. Section 19(1) of the 1968 Act requires a prosecution to be commenced within three years of the commission of the offence or one year from its discovery by the prosecutor, whichever is earlier. A complaint about the vehicle was first made by the aggrieved consumer on May 9, 1983. At that time the trading standards officer was told the identity of the applicants, the details concerning the vehicle, the trouble with the car and that the complaint related to its mileage. A number of interviews and discussions took place between the consumer and the prosecutor. Finally, on May 18, 1983 the consumer told the prosecutor that she had information to the effect that the car had been involved in a serious accident, had been rebuilt and a new speedometer fitted. The prosecutor did not receive written confirmation of this until June 1, 1983. The applicants argued that by May 18, 1983 the prosecutor had discovered the offence and consequently the informations were laid outside the statutory period. On application for judicial review of the justices' ruling in favour of the prosecutor.

Held: that the prosecutor knew of the relevant material facts at the latest by May 18, 1983. The issue of knowledge of the facts should not be confused with that of confirmation of those facts; consequently, the application would succeed.

R. v. Beaconsfield Justices, ex parte Johnson and Sons Limited Q.B.D. 535

Trade Descriptions — false statement in travel brochure — subsequent discovery of falsity — attempt to correct error — whether an offence under s. 14 of the Trade Descriptions Act 1968.

The respondents published a travel brochure early in 1981 in which were contained statements and photographs concerning accommodation and facilities at a particular hotel. One of the statements concerning the hotel was untrue but this was not known at the time. Nor was it known that one of the photographs was of a room in another hotel and not of a room in the hotel in question. The errors were discovered towards the end of May 1981 and, on June 1, memoranda correcting the brochure were sent to staff and sales agents instructing them to inform travel agents and customers of the errors when making bookings. Existing customers were informed by letter. The complainant booked his holiday in January 1982 and was not informed of the errors and on his return he complained to his local trading standards department. The respondents were charged under s. 14(1)(a) in that they had, in the course of a trade or business, made a statement knowing it to be false as to the nature of accommodation at the hotel. In addition, they were also charged under s. 14(1)(b) with recklessly making a false statement as to the nature of accommodation at the hotel. This charge related to the photograph. The magistrates convicted and on appeal, the Divisional Court quashed both convictions. The appellant appealed against the quashing of the conviction in relation to the charge under s. 14(1)(a) only. The point of law certified was whether a defendant may be properly convicted of an offence under s. 14(1)(a) of the Trade Descriptions Act 1968 when he has no knowledge of the falsity of the statement at the time of publication but knew of the falsity at the time when the statement was read by the complainant.

Held: That the respondent company had been rightly convicted under s. 14(1)(a). The necessary ingredients of an offence under this subsection are that: (1) a person in the course of a

trade or business (2) makes a statement (3) which he knows to be false (4) as to the provision in the course of a trade or business of any services, accommodation or facilities. Whilst it was an essential ingredient of the offence for the prosecution to prove that the respondent company knew that the statement was false, it was not essential to prove that the respondent company knew that it was making a false statement. Accordingly, the offence was strict to the extent that the making of the statement can be committed unknowingly. (*R. v. Thomson Holidays Ltd.* (1974) 138 J.P. 284; [1974] Q.B. 592 considered. Per Lord Hailsham of St. Marylebone L.C., Lord Scarman and Lord Templeman, it was open to the respondents to raise the statutory defence in s. 24 of the 1968 Act and show that the offence arose as a result of a mistake of the company or the act or default of another person and that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

Appeal: against the decision of the Queen's Bench Divisional Court (1984) 148 J.P. 183; [1984] W.L.R. 731.

Wings Ltd. v. Ellis H.L. 33

Trade descriptions — whether hiring of counterfeit videos a supply of goods — s. 1(1)(b) Trade Descriptions Act 1968 — membership of club — whether supply in the course of a trade or business.

Six informations were laid against the appellant under s. 1(1)(b) of the Trade Descriptions Act 1968, namely, that in the course of a trade or business he had offered to supply goods to which a false description was applied. The informations related to the offering for hire of video cassettes which were copies and which falsely bore labels indicating that they were produced by certain companies. The informations were laid following investigations by trading standards officers at the appellant's premises. The investigations revealed that a customer could either pay £25 per tape plus a hiring fee, the £25 being refunded on returning the tape, or £25 which was non-returnable and following that, a fee for each tape that was hired. Customers were also supplied with a membership card which had a number on it. The magistrates convicted the appellant on all the charges. On appeal.

Held: (1) An offer to hire goods to members of the public on payment of a fee amounts to an offer to supply those goods. Supply is, in effect, distribution and the hiring of goods in return for a fee is a method of distribution, and it is not necessary to prove there has been a sale for the purposes of s. 1(1)(b).

(2) There was no evidence of the actual existence of anything which could be termed a genuine club which distributed the cassettes to a restricted group of persons as opposed to the general public. On the face ot it what the appellant had done was a colourable device to call it a club. The appeals would be dismissed.

Cahalne v. London Borough of Croydon Q.B.D. 561

Trade descriptions — whether statements that goods to be delivered identical to those seen by purchaser are statements of fact or future intention — s.1 Trade Descriptions Act 1968 — statement purchased as seen in letter sent after delivery — whether statement furnished in connexion with the carrying out of a consumer transaction — art.3(d) of the Consumer Transaction (Restrictions on Statements) Order 1976.

A number of information were laid against the appellants. The first two concerned false

statements by the appellant that bedroom furniture supplied to a customer was "identical" to furniture previously seen by the customer. The appellants were charged under s.1(1)(a) and 1(1)(b) Trade Descriptions Act 1968 with applying, in the course of a trade or business, a false description to goods, and supplying goods to which a false trade description was applied. The third information related to a letter sent by the appellants to the same customer six or seven weeks later in which was contained the statement that the goods were "purchased . . . as seen", contrary to art.3(d) of the Consumer Transactions (Restriction on Statements) Order 1976 (as amended). The fourth information concerned a false statement to the effect that a suite was "perfect", in that it represented all round a uniform appearance, namely all the cushions were reversible. The suite was delivered and on examination was found to have one cushion which was not so reversible. The appellants were charged with an offence under s.1(1)(b) of the 1968 Act, in that in the course of a trade or business, they had supplied goods to which a false trade description was applied. The fifth and sixth informations were essentially concerned with the same point. They both related to a table, which was not supplied with a glass top as had been promised by the appellants, contrary to s.1(1)(b) of the 1968 Act. The magistrates convicted the appellants upon all the informations, and the Crown Court dismissed the appeal by the appellants. On appeal to the Divisional Court by way of case stated:

Held: (1) That the statements concerning both the bedroom furniture and the suite were statements of existing fact; also the items delivered carried with them the description given to them at the time the agreement was made. However, in respect of the table and missing glass top, in no sense was a false description applied to anything, it was merely an error made in the course of supply.

(2) The court found it impossible to come to the conclusion that the letter containing the statement "purchased . . . as seen" was written in connexion with the carrying out of a consumer transaction, as is required under art.3(d) for there to be an offence. The letter was utterly remote from the transaction.

Appeal: by way of case stated by the Crown Court at Sheffield in respect of the dismissal of the appeal by the appellants against conviction by the Sheffield justices.

Cavendish Woodhouse Limited v. Wright O.B.D. 497

Misdescription of frozen meat — statutory defence — whether reasonable precautions and due diligence exercised — whether misdescription could have been discovered by reasonable diligence — s. 24(1)(b) and s. 24(3) of the Trade Descriptions Act 1968.

Meat displayed for sale and supplied was misdescribed as "rump" steak, when it was actually "silverside". The respondents were charged with offences under s. 1(1)(a) and (b) of the Trade Descriptions Act. The respondents sought to rely on the statutory defences in s. 24(1) and (3), in that they had exercised all reasonable precautions and all due diligence within s. 24(1)(b), and that it could not have been discovered with reasonable diligence that the meat did not comply with its description within s. 24(3). It was established that when the meat arrived at the respondents' premises it was in a frozen state and was then placed in a cold store. Subsequently, it was taken to a cutting shed where an employee of the respondents, an experienced butcher, cut or saw the frozen joints into suitable pieces for retail sale. One such piece misdescribed as "rump" steak formed the basis of the informations. The justices found as a fact that the respondents employed an experienced butcher part of whose job it was to select at random joints which were thawed and checked against the invoice. They also found that it was not possible for the respondents to carry out adequate checks of all the joints unless they were defrosted which was of itself impracticable. The justices accepted that the defences in s. 24 of the 1968 Act were made out. On appeal:

Held: What amounts to all reasonable precautions and all due diligence will vary according to the circumstances. In the present case the random tests carried out by the respondents, without more, were not adequate evidence of the exercise of reasonable precautions and due diligence. Furthermore, in view of the fact that it was not possible to defrost all the items, there was an obligation on the respondents to make inquiries of their suppliers as to the safeguards they

operated to prevent this type of well-known problem from arising (applying *Wandsworth Borough Council v. Bentley* (1980) R.T.R. 429); as no such inquiry had been made the respondents could not avail themselves of the statutory defences.

Amos v. Melcon (Frozen Foods) Limited Q.B.D. 712

Trade Description — supply of vehicle by self-employed courier — false description applied to vehicle — whether supply took place in course of a trade or business — s. 1 Trade Descriptions Act 1968.

The respondent was a self-employed courier who transported films, video tapes and other material to and from a variety of destinations for a television company. He used his own motor car for this purpose. He was paid a fee and subsistence allowance for each journey he undertook, and was responsible for his own running expenses on the vehicle which was used almost exclusively for business purposes. The respondent traded in the vehicle in question for a new one. He made a false statement as to the mileage. He was charged under s. 1(1)(a) of the Trade Descriptions Act 1968, with having, in the course of a trade or business, applied a false statement to the vehicle. The magistrates convicted but the Divisional Court quashed the conviction on the ground that the application of the description had not taken place in the course of a trade or business. The question certified by the Divisional Court was:

> "Whether when a person who almost exclusively in the course of his occupation uses his car for the purpose of that occupation and then disposes of the vehicle for another for a similar use he acts in the course of a trade or business when applying a false trade description to the said sale".

Held: The expression "in the course of a trade or business" conveys the concept of some degree of regularity. That until such time as it is possible to say that the selling off of equipment used in the business, as opposed to stock in trade, had become normal practice there could be no supply "in the course of a trade or business". The appeal would be dismissed (*Havering London Borough v. Stevenson* (1970) 134 J.P. 689; [1970] 1 W.L.R. 1375 distinguished).

Sumner v. Davies H.L. 110

TOWN AND COUNTRY PLANNING

Planning Law — control of advertisements — whether person deemed to display an advertisement because it gives publicity to his goods etc. can be convicted where he does not know of the advertisement's original display but becomes aware of its continued display — Town and Country Planning Act 1971, s. 109 and Town and Country Planning (Control of Advertisements) Regulations 1984, regs. 6 & 8.

A number of the respondent's posters were displayed in Derby without the consent of the local authority. There was no evidence as to who had displayed the posters. The appellant, being the local authority's secretary, wrote to the respondent requesting the removal of the posters. The respondent replied that it had neither displayed the posters or authorized anyone else to do so. The posters were not removed. The appellant prosecuted the respondent for displaying advertisements without consent. The prosecution relied on s. 109(3) of the Town and Country Planning Act 1971, part of the effect of which is that (i) a person is deemed to display an advertisement which gives publicity to his goods, trade, business, or other concerns, provided that (ii) such deemed display shall not give rise to an offence if the defendant proves that the advertisement was displayed without his knowledge or consent.

The respondent argued that (i) the offence was committed when the posters were affixed to their various positions; (ii) at that stage the respondent did not know of their display; and (iii) knowledge gained after the commission of the offence did not defeat the defence provided by s. 109(3). The justices dismissed the informations. On appeal by way of case stated to the Divisional Court.

Held: (allowing the appeal) (i) the display of an advertisement is a continuing condition giving rise to one offence only; (ii) the acquisition of knowledge of display during the course of that condition precludes reliance on the defence contained in the proviso to s. 109(3); therefore (iii) the case should be remitted to the justices for further consideration.

Appeal by way of case stated by the secretary of Derby City Council against the dismissal of informations by the justices for the Petty Sessional Division of Derby and South Derbyshire.

Preston v. British Union for the Abolition of Vivisection Q.B.D. 740

Planning Law — enforcement notices — time of coming into effect — Town and Country Planning Act 1971

The appellant local authority issued an enforcement notice requiring the respondents to discontinue a certain use of certain premises. The respondents appealed to the Secretary of State against the enforcement notice. The Inspector who determined the appeal issued a decision letter dated July 7, 1983. The enforcement notice was, in essence, upheld but the time allowed for compliance was extended by the Inspector. The new period for compliance was nine months, which would expire on April 6, 1984, if calculated from the date of the decision letter. On April 18, 1984, the prohibited use was found to be continuing and the respondents were prosecuted for non-compliance with the enforcement notice.

In the magistrates' court, a submission of no case to answer was made on the basis that the enforcement notice had not come into force by April 18, 1984. This submission was based on (i) the wording of s. 88(10) of the Town and Country Planning Act 1971, which provides: "Where an appeal is brought under this section the enforcement notice shall be of no effect pending the final determination or the withdrawal of the appeal"; (ii) O. 55 r. 4(4) R.S.C. which provides for a period of 28 days within which the Secretary of State's decision can be challenged in the High Court; and (iii) certain observations of Bridge J. in *Garland v. Westminster L.B.C.* The magistrates agreed that there was no case for the respondents to answer. On appeal by the prosecution:

Held: (allowing the appeal) (i) the case of *Garland* was distinguishable on its facts, and in any event the relevant observations of Bridge J. were not only *obiter* but had also been misunderstood; and (ii) the present case depended on the construction of s. 88(10) of the 1971 Act and it was clear that that section was not susceptible to the interpretation advanced by the respondents and accepted by the magistrates.

Appeal by way of case stated from a decision of the Dover justices upholding a submission of no case to answer.

Dover District Council v. McKeen and Mckeen Q.B.D. 486

ROYAL SCHOOL FOR THE BLIND

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